

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1897.

A. M. THOMAS, J. B. HART, and  
H. B. OWENS, as the Board of  
County Commissioners of Kay  
County, Oklahoma Territory, *et al.*,  
*Appellants.*

vs.

D. P. GAY and A. S. REED, partners  
as GAY & REED, *et al.*,  
*Appellees.*

No. 287.

D. P. GAY and A. S. REED, partners  
as Gay & Reed, *et al.*,  
*Appellants.*

vs.

A. M. THOMAS, J. B. HART and H.  
B. OWEN, as the Board of County  
Commissioners of Kay County, Ok-  
lahoma Territory, *et al.*,  
*Appellees.*

No. 439.

*Appeals from the Supreme Court of the Territory of  
Oklahoma.*

**Brief on Behalf of Cross Appellants, Gay & Reed, Et al.**

## STATEMENT OF THE CASE.

This was an action in the District Court of the County  
of Kay and Territory of Oklahoma, brought by D. P.  
Gay and A. S. Reed, partners as Gay & Reed, and

twenty-five other firms and individuals, against the county officers of Kay County, Oklahoma Territory, to restrain the collection of territorial and county taxes attempted to be levied and collected by the said officers of Kay County on the property of the plaintiffs located in the Osage and Kaw Indian reservations, and in that part thereof which had been, by order of the Supreme Court of the Territory of Oklahoma theretofore attached to the said County of Kay for judicial purposes.

The parties joined in bringing suit to restrain the collection of these taxes under section 265 of the Civil Code of Oklahoma Territory, which authorizes any number of persons whose property is affected by a tax or assessment to unite in the petition filed to restrain the collection of such taxes.

The petition states the facts on which the case was tried, the defendants demurring thereto (see record page 17) and when the case came on to be tried on January 8th, 1896, it was agreed in open court that the demurrer should be carried to the relief demanded in whole or part and that the case be submitted to the final consideration of the court upon the petition and the demurrer, and upon the law applied to the facts stated in the petition, and that the plaintiffs should be entitled to any or all relief in whole or in part, which the facts in their petition would warrant, and that relief should be denied in the same manner, and in fact submitting the entire controversy on the facts stated in the petition, authorizing the court to render final judgment as such facts would warrant, under the law. In short the petition was treated as an agreed statement of facts. (See record, pages 18 and 19).

The petition (record pp. 7 to 16, inclusive), states the facts as follows:

"*Second.* That the boundaries of the said County of Kay and Territory of Oklahoma were established by the Secretary of the Interior, the said territory comprised in said county being a part of the Cherokee Outlet, opened to settlement on the sixteenth day of September, A. D. 1893, under and by virtue of the President's proclamation opening the same to settlement, and the Secretary of the Interior established the boundaries of such county as follows, to-wit :

"The said county is bounded on the north by the State of Kansas; on the east by the Arkansas river; on the south by the Ponca Indian Reservation and by the sixth standard parallel, and on the west by the range line between ranges two and three, west.

"That immediately upon the opening of the said Cherokee Outlet to settlement, a county government was established in said Kay County, and within the boundaries herein described, and that the boundaries of said county have remained unchanged from thence until the present time.

"*Third.* That the Supreme Court of the Territory of Oklahoma, on the third Monday of February, 1894, and by order duly entered on the journal of said Court, attached to the said county of Kay, aforesaid, all of the following Indian Reservations and territory, to-wit :

"All of the Kaw or Kansas Indian Reservation and all of the Osage Indian Reservation north of the township line dividing townships twenty-five and twenty-six, north.

"That all of said territory is without the boundaries of the said Kay County as established by the Secretary of the Interior, and that the said order of the Supreme Court aforesaid attached the said territory to said county of Kay for judicial purposes, and for judicial purposes

only, and for no other purpose whatever, and that no other change has ever been made in the boundaries of the said county of Kay and Territory of Oklahoma by virtue of any other authority, or pretended authority, whatever than the annexation of the said Indian reservation to the said county for judicial purposes, as aforesaid, and that no extension of the boundaries of the said county of Kay have ever been made or attempted to be made by any authority whatever, except the order of the Supreme Court of said Territory, hereinbefore referred to.

*Fourth.* That the third legislative assembly of the Territory of Oklahoma by the act approved March 5th, 1895, being article six of chapter forty-three of the Session Laws of said Territory for the year 1895, attempted to provide for the assessment and taxation in Oklahoma of cattle kept and grazed and any other personal property situated in any unorganized country, district or reservation in the county to which such country, district or reservation is attached for judicial purposes.

"That in pursuance of said act of the legislative assembly of said Territory, the board of county commissioners of said county of Kay appointed a special assessor for the purpose of assessing all of the personal property in said Kaw Indian reservation and in said Osage Indian reservation, north of said township line, and the said assessor did, by virtue of such appointment, assess all of the personal property in the said territory so attached to the said county of Kay for judicial purposes, and returned to the county clerk of said county an assessment roll of the property by him attempted to be assessed in the said territory attached to said county of Kay for judicial purposes.

*Fifth.* That none of the plaintiffs in this action have or at any time owned any personal property whatever situated or located within the County of Kay and

Territory of Oklahoma, according to the proper boundaries thereof.

"That the said territory, attached to the said county of Kay and Territory of Oklahoma for judicial purposes, comprises the Kaw or Kansas Indian Reservation and a part of the Osage Indian Reservation, and is comprised wholly of lands owned, paid for and occupied by said Indian tribes, and consist principally of wild, unimproved and unallotted lands, which said wild, unimproved and unallotted lands, which were not needed for allotment, have been leased to these plaintiffs for grazing purposes by the Osage and Kaw Indian tribal governments, under the supervision of the agent in charge of said tribes, and with the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, for grazing purposes, as provided by Act of Congress.

"That these plaintiffs, during the year 1895 and during the month of April of said year, at the commencement of the grazing season, drove, transported and shipped to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken onto said reservations in pursuance of and by virtue and authority of said leases with the said Indian tribes, together with other articles of personal property necessary and needful in herding, grazing and caring for said cattle, and that the said plaintiffs did not at any time have any other personal property, during the year 1895, upon said Indian reservations aforesaid, and within said territory attached to said County of Kay for judicial purposes, than is hereinbefore set forth, and the said cattle hereinbefore referred to is the same identical property upon which the taxes herein complained of are attempted to be levied.

"That the plaintiffs are all residents of the State of Kansas, the State of Texas and other states, and all of

said plaintiffs are non-residents of the Territory of Oklahoma, and that the greater portion of said property was, for the year 1895, valued and assessed by the authorities of the states from whence the same was removed to the said Osage and Kaw Indian reservations prior to its removal to the said territory attached to the said Kay county, as aforesaid, for judicial purposes, and that said property of these plaintiffs, in pursuance of such assessment and valuation in the states from whence the same was removed to said Indian reservations, was duly taxed for the year 1895; and that such taxes are a valid and subsisting charge against the plaintiffs and each of them, personally, and against all of the property and estates of the plaintiffs located in such foreign states, and are enforceable against the estates and property of the said plaintiffs located within the jurisdiction of such other states and territories, and said taxes can and will be collected from the property and estates of the plaintiffs located therein.

"That none of said property of these plaintiffs was in Kay County, nor was the greater portion thereof within the said territory, attached to said Kay County for judicial purposes, at the time when other property in Kay County was valued for taxation, to-wit, the first day of February, A. D. 1895, but that the greater part of the property of the said plaintiffs, attempted to be valued and assessed by the authorities of said county of Kay and Territory of Oklahoma, was located and removed into the said territory, attached to said Kay County for judicial purposes, after the first day of April, A. D. 1895, and before the first day of May, A. D. 1895.

"That the said cattle, by reason of natural growth and increase in the market value and improvement in their condition, had greatly and substantially improved and increased in value between the first day of February, A. D. 1895, and the first day of May, A. D., 1895; that

the same class and kind of property, located in said Kay County, and also located and kept throughout the Territory of Oklahoma, during the same period improved and increased in value likewise and to the same extent, and that the same class of property located in said Territory did, during such period, greatly and substantially increase in value between such dates and during the same time.

"*Sixth.* That the said special assessor assessed and valued the property of these plaintiffs, so located on said territory attached to said county of Kay and Territory of Oklahoma for judicial purposes, as aforesaid, and assessed the same and returned the same upon said assessment roll hereinbefore referred to at a total valuation of \$760,469.00.

"That thereafter the said sum was by the clerk of said county, unlawfully and without authority, carried into the aggregate assessment for said county and by him certified to the auditor of said Territory.

"That thereafter the Territorial Board of Equalization, in acting upon the various assessments for the various counties, as certified to said board, raised the aggregate valuation of the property in said county of Kay and Territory of Oklahoma thirty-five per cent., and the county clerk of said county unlawfully carried out the raised valuation so certified to him by said Territorial Board of Equalization against the property of these plaintiffs an aggregate valuation of \$1,026,634.00 as the valuation of their said property.

"A schedule, showing the amount for which each of these plaintiffs were assessed by the said special assessor and the valuation of each individual assessment of these plaintiffs, as extended by the county clerk, on account of the action of the Territorial Board of Equalization, and the amount of taxes levied and extended against the property of each of these plaintiffs, is as follows:

NAME OF PLAINTIFF.	Valuation as fixed by Spec'l Assessor	Valuation as fixed by Ter. Board	Amount of Taxes Extended
D. P. Gay and A. S. Reed, partners as Gay & Reed .....	\$123,800	\$107,130	\$4,378.53
A. M. Miller and J. B. Johnson, as partners as Miller & Johnson .....	22,190	20,957	766.90
M. Half and S. Half, as partners as Half Bros .....	85,700	115,817	2,964.92
R. H. Harris, W. C. Harris and William Childers, partners as Harris Brothers & Childers .....	61,950	83,033	2,241.00
E. T. Comer and H. C. Comer, as partners as Comer Brothers .....	52,433	70,787	1,812.00
Jesse H. Pugh .....	17,105	23,092	591.16
J. H. Carney .....	10,340	26,109	668.39
G. M. Carpenter .....	40,172	54,232	1,388.34
Virgil Herard .....	51,675	69,761	1,785.98
G. T. Hume .....	59,970	80,690	2,065.66
W. F. Smith and W. L. McCauley, as partners as Smith & McCauley .....	8,080	10,840	277.50
W. F. Smith .....	634	842	21.55
W. W. Irons .....	6,750	9,113	233.29
C. W. Burt .....	25,945	35,026	896.66
A. I. Adams .....	6,600	8,100	207.36
A. I. Adams and Neal Shafer, as partners as Adams & Shafer .....	29,705	40,102	1,026.61
E. M. Hewins .....	18,520	25,002	640.05
Douglas Pierce and J. T. Crump, as partners as Pierce & Crump .....	6,445	8,700	222.72
James Stone .....	14,440	19,494	499.04
W. M. Holloway .....	8,840	11,934	305.51
R. H. Mosley .....	41,125	57,125	1,462.40
Drury Warren .....	8,200	11,070	283.39
T. J. Moore .....	42,815	57,125	1,462.40
J. M. Slater .....	13,820	18,657	477.62
R. W. Prosser .....	14,050	18,968	485.59
I. D. Harkleroad .....	2,400	3,240	82.94

"That the said valuation and assessment of the said special assessor of the property situated in said territory, attached to the county of Kay and Territory of Oklahoma for judicial purposes, was made on the first day of May, A. D. 1895.

"*Seventh.* That thereafter the Territorial Board of Equalization levied and duly certified to the county clerk of the County of Kay and Territory of Oklahoma tax levies for Territorial purposes, for the year 1895, as follows, to-wit:

- " General revenue, three mills on the dollar.
- " University fund, one-half mill on the dollar.
- " Normal school fund, one-half mill on the dollar.
- " Bond interest fund, one-half mill on the dollar.
- " Board of Education fund, one-tenth mill on the dollar.

Making a total of four and six-tenths mills on each dollar of valuation for the purpose of taxation levied by the Territorial Board of Equalization for Territorial purposes.

"That thereafter the board of county commissioners of the County of Kay and Territory of Oklahoma made the following levies for the year, 1895, to-wit:

- " For salaries, five mills on the dollar.
- " For contingent expenses, three mills on the dollar.
- " For sinking fund, one and one-half mills on the dollar.
- " For court expenses, two and one-half mills on the dollar.
- " For county supplies, three mills on the dollar.
- " For road and bridge fund, two mills on the dollar.
- " For poor fund of said county, one mill on the dollar.
- " For county school purposes, three mills on the dollar.

Making a total, for county purposes, of twenty-one mills on the dollar of valuation levied in said county, for the year 1895, by the board of county commissioners of said county, for county purposes.

"That the county clerk of said County of Kay and Territory of Oklahoma carried the valuations of the property of these plaintiffs on the tax rolls of said county and extended against the same, according to the county and Territorial levies aforesaid, and charged to the same taxes in the aggregate sum of \$26,174.16 for the year 1895. A detailed statement, showing the amount of taxes charged against these plaintiffs, each of them, is fully set forth in the above schedule.

"*Eighth.* The plaintiffs allege that the action of the Territorial Board of Equalization, in attempting to raise the valuation of the property of these plaintiffs, and the action of the county clerk in attempting to extend the same and such raised valuation on the tax books of said county against these plaintiffs, is null and void in this, to-wit:

"1. That said board has no power or jurisdiction to alter the assessment of property made or attempted to be made in such unorganized territory and reservations attached to the counties of the Territory of Oklahoma for judicial purposes.

"2. Because the attempted raise so made by said Territorial Board of Equalization aforesaid was not an equalization, but was an attempt upon the part of the said Territorial Board of Equalization to make an assessment which they thought would conform nearer to the value of the property in said territory than that made by the local assessors.

"That the Territorial Board of Equalization raised the aggregate valuation of all the counties in said Territory except the county of Kingfisher, which they permitted to remain, in the aggregate, as returned to said board by the county clerk of said county, and adopted the rate of valuation in Kingfisher County as their standard of valuation for all of the counties of the Territory, and raised the aggregate valuation of the other counties from five to seventy-five per cent., to bring the valuation up to what they conceived to be the standard adopted in said Kingfisher County, and which action on the part of said Territorial Board of Equalization the said plaintiffs allege to be wholly unauthorized and void.

"*Ninth.* The plaintiffs allege and aver that all the proceedings looking to the assessment and taxation of these plaintiffs are null and void for the following reasons, to-wit:

"1. Because the said article six (6) is *local* and *special* legislation; that by the laws of said Territory the property of the residents of the counties in said Territory is assessed and valued at its value on the first day of February in each year, whereas, the property of these plaintiffs located in said unorganized country attached to said county of Kay for judicial purposes, is valued as of the first day of May, at a time when it possesses substantially a greater value than the same class of property possesses on the first day of February.

"2. Because personal property which is brought into any organized county of the Territory after the first day of February and before the first day of September, is not taxable if the same shall have been assessed for taxation in some other state or territory for that year; whereas, the property of these plaintiffs that was brought into said unorganized country from other states and territories after the first day of February and after having been assessed for the year 1895, for taxation, is taxed regardless of the fact that it has already been taxed for the year 1895, in the states and territories from whence it was brought.

"That the said act makes an unequal discrimination in taxing different kinds of personal property, in violation of the Organic Act of this Territory.

"That the said Osage and Kaw Indian reservations are not now, and never have been, a part of the County of Kay, or a part of the Territory of Oklahoma for the purposes of taxation; that the residents of said Indian reservations do not receive from said Kay County any police or other protection.

"That the said Indian reservations are not a part of said County; that the residents of said Indian reservations have no voice in creating the indebtedness for which said taxes are levied to pay; that they have no voice in the election of officers for the payment of whose

salaries said levies are made; that they have no voice or benefit from the contingent fund of said County and for which the three mills' levy is made; that they have no voice in the creation of the indebtedness and derive no benefit from such debt, for which the sinking fund is provided in said county.

"That they have no protection from the court expenses incurred in said county and no voice in its expenditure; that the said Kay County does not furnish to the residents of said Indian reservation any court facilities other than are furnished to citizens of other states and territories, and that the levy of two and one-half mills made for that purpose is entirely without any benefit to the residents of said Indian reservations; that they have no interest in the county supplies and other county levies.

"That they do not participate in the benefit of the schools of said County of Kay, nor the construction of roads and bridges therein, nor do they receive any benefit or have any voice in the expenditure of the poor-fund of said Kay County; nor do the residents of the said Indian reservations derive any benefits from the said poor fund as the same is wholly expended for the use and benefit of the residents of the said Kay County.

"That the said act is illegal in that it attempts to tax the property situated in said Indian reservations for the benefit of the residents of said Kay County and that all of said taxes are illegal and void and are unjust discriminations and exactions upon the residents of said Osage, Indian reservation and said Kaw Indian reservation for the benefit of the residents of said Kay County and of said Territory.

"That the said act is void and unconstitutional in this: It is in violation of the Organic Act of said Territory of Oklahoma in this, to-wit: That it only provides for the assessment and taxation of cattle kept and grazed

and other personal property situated in said Osage Indian reservation and Kaw Indian reservation, and other Indian reservations, and does not provide for the taxation of real estate or of any personal property save and except cattle and other tangible personal property, and the said law, by reason thereof, is a discrimination in taxation between different kinds of personal property in that it exempts from taxation all real estate and choses in action and credits situated and located in said unorganized territory and reservations attached to organized counties for judicial purposes.

"That there was in said Indian reservations at the time of the passage of said act, and on the first day of May, and is now, large quantities of real estate and rights of way and station grounds of railroad companies of great value that are real estate, together with choses in action, credits, and other tangible personal property, that under the provisions of said act are not taxable and cannot be taxed.

"That the said Osage Indian Reservation and Kaw Indian Reservation are not properly a part of the Territory of Oklahoma for the purpose of taxation for Territorial purposes, nor do the residents of said Indian reservations participate in the benefits of the Territorial government; but that the said taxation throughout is taxation for a private and not for a public use, and is an illegal and unequal exaction, not in behalf of and for the use and benefit of the Territory of Oklahoma and the courts therein, but is exacted for the private use and benefit of the residents of said Territory.

"That the property of these plaintiffs was taken into said reservations under and by virtue of leases executed by said Indian tribes, by and through the Indian agent, as aforesaid, under the provisions of the laws of Congress, and approved by the Secretary of the Interior and the Commissioner of Indian Affairs, and that such taxes

attempted to be levied on the property of these plaintiffs will result directly in impairing the power of the said Indians to lease their said lands and will impair the revenue derived therefrom, and will operate as a tax upon said Indians.

*"Tenth.* That the said defendants have extended their levies against the valuation of the property of these plaintiffs as hereinbefore set out, and at the date of the commencement of this suit were threatening to, and would, except for the temporary injunctions heretofore granted in the various causes consolidated herein, have issued tax warrants and other process for the seizure of the property of the said plaintiffs and the collection of said taxes, and that the said defendants will, unless perpetually enjoined therefrom, attempt to collect and will collect said unlawful taxes, as aforesaid, from the property of the said plaintiffs."

The court decreed the following levies to be a valid charge against the property of the plaintiffs: The county levy of two and one-half mills for court expenses, and the territorial levies amounting to four and six-tenths mills, and denied the petitioners any relief on account of such levies; but enjoined the collection of all other levies, resulting in the holding of \$19,071.00 of the taxes attempted to be levied, invalid and in holding \$7,210.00 of the taxes attempted to be levied, valid.

From this judgment both parties prosecuted proceedings in error in the Supreme Court of the Territory, where the case was affirmed by a divided court on September 4th, 1896, Tarsney, J., holding to the view that the taxes were all valid, Scott and McAtee, J. J., agreeing that the judgment of the court below was right, and Dale, C. J., entertaining the view that the taxes were all invalid.

From this decision both parties appeal to this court. The cross appellants in this court contend that all of said taxes are illegal and void.

*First—Because under the Organic Act and the several statutes of the United States, the legislature of the Territory has no jurisdiction to enact laws—especially tax laws—and put them in force in these Indian reservations.*

*Second—Because said Indian reservations, under the statutes of the United States, are authorized to be leased by the Osage and Kaw tribes of Indians for grazing purposes, and the taxation of cattle kept and grazed on said Indian reservations is a direct tax upon the right of the Indian tribes to lease the same, and decreases, to the extent of the tax, the grazable value of the Indian lands.*

*Third—The said act of the legislature is unconstitutional and void in that it confers upon the Supreme Court of the Territory the right to fix taxing districts, which is a legislative function.*

*Fourth—Because the act of the legislature of the Territory under which these taxes are sought to be levied is void for the reason that it attempts to tax property situated in said Indian reservations for the benefit of the counties to which they are attached for judicial purposes, the owners and holders of the property on these Indian reservations having no interest in the taxes gathered by either of said counties or by the Territory, no voice in their expenditure, and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking*

*the property of persons holding property on said Indian reservations for the benefit of the residents of said counties and is taking private property for private purposes.*

*Fifth—The said act of the legislature is void in that it is in conflict with the provisions of the Organic Act providing that the legislature of the Territory "shall not pass any law impairing the right to private property, nor shall any unequal discriminations be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," and the said act is also a discrimination in the taxation of the same kind of property and violates the rule of uniformity in taxation.*

*Sixth—That the said act of the legislature is void in that it is local and special legislation, and in violation of the provisions of section one of the Act of Congress of July 3, 1886.*

*Seventh—That the thirty-five per cent. added to the assessed value of said property by the order of the Territorial Board of Equalization is unauthorized and void.*

## ARGUMENT.

### I.

**Under the Organic Act and the several statutes of the United States, the Legislature of the Territory has no jurisdiction to enact laws—especially tax laws—and put them in force in these Indian Reservations.**

The position of the territories, and their relation to the general government, is one of dependency. They do not possess full powers, even of local self-government, and they are subject to the exclusive jurisdiction and legislation of Congress.

Black's Constitutional Law, p. 19.

*Snow vs. United States*, 18 Wall. p. 319.

*National Bank vs. County of Yankton*, 101 U. S., 133.

In discussing the meaning of the term used in our Organic Act, "that the legislative power of the Territory shall extend to all rightful subjects of legislation," Chief Justice Zane, in *Territory vs. Daniels*, (Utah), 22 Pac. Rep., 160, says:

"When the authority with respect to the subject is specific, and its extent is clearly defined, the discretion of the Legislature within Constitutional limitations cannot be questioned; the denial of such discretion would be a denial of the power of Congress; but when the power is given in general terms, and the extent to which it may be exercised upon the subject is not expressly limited and clearly defined in the Organic Act, then the Territorial Legislature must exercise its discretion. So far as that discretion is expressly limited by the Constitution or the Organic Act such limitation must be observed; but when it is not, the Legislature must follow the dictates of reason and justice. The law must be reasonable and just, because the court will not presume that Congress intended to authorize the Legislature to make an unjust, an unreasonable, an unequal, or an oppressive law. The subjects to which the power of the Territorial Legislature extends are not specifically described, and their number is limited by the word 'rightful.' A law upon a subject not of that number would be held void. In that

case the court would determine that the subject was not within the power of the Legislature; and as to the extent to which the Legislature may act on a rightful subject, when the limit is not expressly fixed, the court must ascertain the limit and determine whether the law is within it."

It is conceded at the outset, that Section one of the Organic Act, in defining the boundaries of Oklahoma Territory, extends the exterior boundary of the Territory around these Indian reservations.

If our inquiry, therefore, should stop at the end of this clause of Section one of the Organic Act, we would be compelled to say that the territory comprising these Indian reservations is a part of Oklahoma for all purposes.

But the defining of the boundaries is not all there is in the Organic Act. Section one also provides:

"That nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians."

And that the residents of these Indian reservations were not recognized by the Organic Act as citizens of the Territory is expressly gathered from Section five of the Organic Act, which provides:

"That all male citizens of the United States, above the age of twenty-one years, and all male persons of foreign birth over said age, who shall have, \* \* \* who are actual residents at the time of the passage of this Act of that portion of said Territory which was declared by the proclamation of the President to be opened to settlement, \* \* \* shall be entitled to vote at the first election in the Territory."

The Organic Act provided the means whereby the Territory should be divided into Council and Representative districts, and provided for the election of a Legislative Assembly, and for the election of a Delegate to Congress. The Indian reservations were not included within any of the Council or Representative districts. They were not included in any counties, and since the settlement of Oklahoma they have not been permitted to participate in the Territorial government in any way.

The act provided that there should be seven counties, and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these Indian reservations, or any lands not then open to settlement, in any of the counties.

The only control over these Indian reservations was delegated to the Supreme Court of the Territory. By section nine of the Organic Act it was provided that the "Territory shall be divided into three judicial districts.

\* \* \* The Supreme Court shall define said judicial districts, \* \* \* and the territory not embraced in organized counties shall be attached, for judicial purposes, to such organized county or counties as the Supreme Court may determine."

Following this authority the Supreme Court, May 29, 1890, made an order attaching the Cherokee Outlet, and the various Indian reservations of the Territory to certain organized counties for judicial purposes, and these Indian reservations, so far as the territory embraced in this litigation is concerned, remained the same

from that time until the opening of the Cherokee Outlet, and the increase of the number of judges of the Supreme Court.

On February 3d, 1894, the Supreme Court entered the following order:

" \* \* \* And it is further ordered that all that portion of the Osage Indian reservation south of the township line between townships twenty-five and twenty-six is hereby attached to "Q" (now Pawnee) County for judicial purposes; and all that portion of the Osage Indian reservation north of said township line, and the Kaw or Kansas Indian reservation, are hereby attached to "K" (now Kay) County, for judicial purposes."

No attempt has ever been made by the territorial legislature to change any of these county boundaries, or to include these Indian reservations within the boundaries of any county, either organized or unorganized; nor has any attempt in any way been made to regulate the judicial districts, or to append any of these Indian reservations to any county for judicial purposes.

All the country opened to settlement since 1889 has been divided into counties by the Secretary of the Interior, by authority of the acts opening such lands to settlement. The Supreme Court of the Territory has exclusively fixed judicial districts, and attached unorganized territory to organized counties for judicial purposes, making such changes as the convenience of the court required.

After the taking effect of the Organic Act every department of government in the Territory, the executive, legislative and judicial, as well as the various departments of the general government, have treated these

Indian reservations as being separate and distinct from the organized portion of the Territory of Oklahoma.

From the time the Organic Act took effect until the decision of the Court below, in this case, crimes committed in these Indian reservations, by white men, have been prosecuted on the United States' side of the Court, as violations of the Statutes of the United States, the United States paying the expenses of such prosecution, and since the handing down of the decision by Justice Tarsney, in the Court below, four of the five districts in the Territory have continued to enforce the same rule. Justice Tarsney alone, since the rendering of said decision, in his district, has enforced in the Indian reservations, the criminal laws of the Territory against white men who have committed crimes in the Indian reservations. In the judicial districts to which these Indian reservations are attached for judicial purposes, all white men who have committed crimes within the territory embraced in this litigation, have been prosecuted on the United States' side of the Court, and at the expense of the United States.

It is true, also, that Indians who have committed crimes on these Indian reservations have been prosecuted for violations of the Laws of the Territory, under the Act of March 3, 1885, 23 U. S. Stats. at Large, p. 385, the United States, however, paying all the expenses of such prosecutions, under the provisions of Section 11 of the Act of March 2, 1889, 25 U. S. Stats. at Large, p. 1004.

Is it possible that all the departments of government that have had to deal with the conditions in these Indian

reservations have been laboring under a misapprehension of the law applicable to these Indian reservations? Is it possible that in the prosecution of these crimes that have been committed in these Indian reservations by white men the courts of this Territory and the various departments of the government and the law officers of the government of the United States, have been laboring under an hallucination, and have been exercising a jurisdiction and depriving the citizens of their liberty, without any law behind them or lawful authority for the arrest and conviction of the perpetrators of such crimes?

The power to legislate, delegated to the Territorial Legislature, includes only "rightful" subjects of legislation. Under this delegation of power could the legislature organize counties in these Indian reservations and set up county governments, establish municipal corporations, townships, school districts and the like, and provide for the maintenance of such municipal corporations by taxation? Would such exercise of power by the Territorial Legislature be in harmony with the control over the Indian country exercised by Act of Congress and by a course of dealing with the Indian tribes as old as the government itself? If it, the Legislature, could not erect organized counties in these Indian reservations, and other municipalities, townships, school districts, road districts and the like, where does it obtain the power to tax them for the benefit of other counties, school districts, townships and the like? And wherein is the power delegated to tax the residents of these Indian reservations, who must reside there if they reside in the Indian

reservations at all, under the sanction and authority of the general government.

The owners of the property in question are not trespassers. They are not setting up against this tax the fact that they are trespassers, or are violating any of the duties and obligations of the government to the Indian tribes. They are there under authority of an Act of Congress, which authorizes these Indian tribes to lease these lands for grazing purposes.

The residents of these Indian reservations have so far received no protection from the laws of the Territory. They have no voice in the election of the legislature to make the laws by which they shall be governed. They have no school facilities for their children. They cannot organize towns and have the benefit of the police and sanitary laws of the Territory. The officers of Kay County have no authority to expend a dollar of the taxes thus gathered to work the roads in these Indian reservations. The residents of these Indian reservations have no voice in the expenditure of a single dollar of this money. They have no voice in creating the debt for which the sinking fund sought to be levied was created, and never received one dollar of benefit therefrom. They have no voice in the election or selection of the delegate that represents the Territory in the Congress of the United States. It seems plain when we consider the relation of these Indian reservations to the Territory, and the attitude of the Territorial and National government towards them, since the organization of the Territory, that the extending of the exterior boundaries of the Territory around these Indian reservations was done

by Congress for the purposes of the government of the United States only, to the end that a forum might be furnished in which Indians could be prosecuted, and white men, committing crimes on these Indian reservations, could be prosecuted, the expenses of all of which have been borne by the government of the United States.

It may be said that these plaintiffs have invoked the aid of the Courts of the district to which these Indian reservations are attached for judicial purposes, for the purpose of preventing this unlawful exaction, and that that is a measure of protection, for which they ought to pay taxes. The expenses of the civil litigants in the Courts of this Territory are borne by the litigants themselves, and the residents of these Indian reservations obtain no greater right to sue in these Courts, or to be sued in these Courts, than the residents of any other State or Territory. The residents of any State or Territory may come to this Territory and invoke the aid of the Courts to protect his rights, and, if found within this jurisdiction, any non-resident may be sued in the Courts of this Territory.

The limitation "for judicial purposes" expresses the measure of control delegated by Congress to the officers of the Territory over these Indian reservations, and that measure of control was delegated to the Supreme Court of the Territory.

The power vested in the Supreme Court to change these Indian reservations and detach the same at any time "for judicial purposes" from one County and attach them, or any part of them, at any time to any other

organized County for judicial purposes, is the only control that has so far, until the passage of this act, been attempted to be exercised over these Indian reservations, and this control has been recognized from the formation of the Territory, by the executive departments of the United States, by the Courts of the Territory, and by the legislative authority of the Territory as well—the Act in question being a recognition of that construction. Is this control vested in the Supreme Court consistent with the jurisdiction assumed by the Territorial Legislature under the Act in question.

Here is a place where the laws of the United States are supreme, where the general laws of the Territory do not run, where the people are not authorized to participate in the Territorial government, where they have no voice in any county, township, school district or city organization, who, if this tax is gathered, will not receive one farthing of benefit—not one penny of it can be expended in that country for any purpose whatever. Yet the legislature, by the Act in question, attempts to require them to contribute of their substance to pay the expenses of a government in which they have no voice, and under which they receive no protection.

It seems to us that these facts are absolutely inconsistent with the idea that the legislature has any control over property situated in these Indian reservations.

It is true that the processes of the Courts may run there. The processes of the Courts are judicial processes and Congress has authorized the Supreme Court of the Territory to attach these reservations to organized counties for judicial purposes. But judicial process and that

process by which the tax gatherer attempts to enforce contributions are not the same.

The case of the *Board of County Commissioners of Yellowstone County vs. The Northern Pacific Railroad Company*, 25 Pac. Rep., p. 1058, is a case in point as to what is meant by the term "judicial processes."

The Yellowstone river was the boundary line between Custer and Yellowstone Counties in the Territory of Montana. The Northern Pacific Railroad Company constructed its road and obtained a grant four hundred feet wide on the south bank of the Yellowstone river in 1885. The Legislature of Montana passed an Act which attached the right-of-way to the County of Yellowstone for "*judicial purposes*," Yellowstone County being on the other side of the river.

The officers of Yellowstone County, under that authority, attempted to tax it in Yellowstone County; and the question was whether or not they were lawfully authorized so to do.

DeWitt, Judge, in the opinion, says:

"The only argument for this position that we have discovered is that this territory is attached to Yellowstone County for judicial purposes. What are 'judicial purposes?' Webster's dictionary defines the word 'judicial' as 'pertaining or appropriate to courts of justice, or to a judge thereof; as, judicial power; a judicial mind. Practiced or employed in the administration of justice; as, judicial proceedings. Proceedings from a court of justice; as, a judicial determination; ordered by a court, as a judicial sale.' The Century Dictionary, the most thorough English lexicon of which we have any knowledge, devotes a large space to the definition of the word 'judicial.' Among other things it says: 'Of or belonging

ing to a court of justice; of or pertaining to a judge; pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry or judgment, as judicial power or proceedings; a judicial decision, writ, sale or punishment; determinative; giving judgment. Judicial act, an act involving the exercise of judicial power.' This excellent work defines the word 'judicial' in connection with many words and expressions with which it is used and invariably in the sense above indicated. It refers to the sinking fund cases, 99 U. S., 700, in which Justice Field says, (page 761): 'The distinction between a judicial and legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one.' Bouvier's Law Dictionary does not define the adjective 'judicial' separately, but treats of it used in connection with a dozen other words, and the whole tenor of definition is so completely in line with what we have already quoted that it is useless to cite further. We cannot doubt in view of the meaning of the word 'judicial,' that the expression 'judicial purposes,' as used in the statute which we are endeavoring to construe, means purposes of the courts and the administration of justice. Taxation certainly does not pertain to the affairs of courts and the administration of justice. Judicial, legislative and executive affairs are very distinctly separated throughout the whole history and policy of American law and government. Their provinces are well defined, and their boundaries sharply drawn."

See also the various definitions of the word "judicial" standing alone, and in connection with other words, *Black's Law Dictionary*, page 658.

*State ex rel. Dollard, Attorney General, vs. Board of County Commissioners, Hughes County, et al.*, 46 N. W. Rep. 1127.

. In the opinion, Kellam, Judge, says:

"In the construction of the statute and its application to the question now under examination, the immediate point of interest is, what did the legislature mean by the expression 'for judicial purposes?' It must be remembered that when this law was passed the counties named were entirely within an Indian reservation. The jurisdiction of the territorial government over that country was restricted and limited to certain purposes, consistent with the treaty rights of the Indians, but the courts had decided in several cases, notably in *Langford vs. Monteith*, 102 U. S. 145, that judicial process, not affecting Indian rights, might run into and be served upon such a reservation; and in March, 1885, Congress passed a law making Indians charged with certain offenses committed either within or without such reservation, triable in the territorial courts. But where should such offenses be tried? In what counties were they indictable? What particular county should have jurisdiction and be authorized to prosecute any particular offense committed in an unorganized county within the limits of the reservation? These considerations would present reasons why the legislature, in 1887, should deem it advisable and important to place these counties, still within the limits of the reservation, under the judicial jurisdiction of an independent, organized county having magistrates, courts, and a grand jury. That they intended so much by the expression, 'for judicial purposes,' is hardly questionable, but did they mean more? A very cursory examination of the acts of the territorial legislature reveals the fact that they did, from time to time, and in many instances,

attach unorganized counties to organized counties for different purposes—sometimes for judicial, sometimes for revenue, and sometimes for election purposes—and in several instances have strongly discouraged the interpretation that judicial purposes might include election purposes, by specially providing for such attachments for both purposes; and in 1881, by chapter 121, the legislature, presumably not regarding the attachment for judicial purposes as sufficient to cover the case, provided specially that such unorganized attached counties should be also so attached for purposes of registration of deeds, mortgages and other instruments. These repeated acts of the legislature indicate, we think, that they had constantly in mind that unorganized counties might be attached to organized counties for different purposes, as exigency or convenience might suggest, and that attaching for one specified purpose did not include any other purpose. But if this statute is to be construed and its meaning determined by the ordinary rules of construction, then another consideration is important, if not dominant. Among Vattel's Rules for the construction of statutes is this: 'The reason of the law—that is, the motive which led to the making of it—is one of the most certain means of establishing the true sense.' Puffendorf expresses the same thought in one of his rules as follows: 'That which helps us most in the discovery of the true meaning of the law is the reason of it, or the cause which moved the legislature to enact it.' Now, can it be reasonably claimed that in 1887, when the legislature attached Nowlin and Sterling counties to Hughes County for judicial purposes, it also intended to attach such counties for election purposes? As we have before seen, or at least attempted to show, there was a reason for so attaching them for judicial purposes, but what fact or reason could have been then present with the legislature to suggest the importance, or even the propriety, of so attaching

them for election purposes? The entire Indian reservation, of which these counties formed a part, was a segregated territory, in which no person could acquire any political rights, nor had the legislature power to confer any. The legislature well knew it had no political jurisdiction over that country, and that any attempt to actually make Nowlin and Sterling Counties a part of Hughes County for election purposes would be nugatory and void. But it may be urged that the legislature had in contemplation a change in the political status of these counties, contingent upon the extinguishment of the Indian rights therein, and while this thought may be entitled to consideration, we do not think we would be justified in going so far to find a reason or a theory upon which we might hold that the legislature had intended to do what they have not done in terms, when the reason for what they have plainly done is so apparent. But it is further claimed that Section 535, Comp. Laws, read in connection with said Chapter 175, Laws 1887, recognizes and confirms the right of defendant to so establish polling precincts in Nowlin and Sterling Counties. It reads as follows: 'Such portions of the territory not organized into counties as are annexed to any organized county shall, for judicial and other purposes, be deemed to be within the limits and a part of the county to which they are annexed.' Whether this section covers the case now in hand, depends entirely upon whether Nowlin and Sterling Counties were 'annexed' to Hughes County within the meaning of that section. That statute declares that, where an unorganized county is annexed to an organized county, certain consequences shall follow generally and without particular enumeration. It fixes the legal status of such annexed county. It shall be deemed to be a part of the senior county, not only for judicial, but for all other purposes. Such annexation, by the very terms of the law, includes not only judicial purposes but all other purposes. The former is more comprehensive, because it

includes the latter and much besides. That attachment for judicial purposes is not the annexation contemplated by that section, is evident both from the section itself and the very obvious consequences immediately involved if such interpretation were adopted. Impressed with that interpretation, the section would put the legislature in the undesirable position of having deliberately and formally declared that an unorganized county attached to an organized county for judicial purposes, is so attached for judicial purposes, which would be idle and supererogatory. We have no hesitation in holding that the annexation contemplated in said Section 535 is a general annexation, and that the attachment of one county to another for a definite and specified purpose, is not such an annexation. The jurisdiction of the senior county over unorganized territory so attached is derived from, and it must be measured by, the Act making the attachment. If the annexation is general, the jurisdiction is general as declared in said Section 535, but, if attached for a specific purpose, the jurisdiction is and must be limited to that purpose. Any other interpretation would not only violate the most elementary rules of construction, but would hinder and embarrass, if not entirely forestall the legislature in the exercise of its unchallenged power to attach unorganized counties to organized counties for specific and limited purposes only."

Under the Organic Act Congress has left nothing to the Legislature of the Territory. The Legislature of the Territory would certainly not have the power to take away from the Supreme Court the power delegated by Congress to the Supreme Court to attach these Indian reservations to organized counties for judicial purposes, and if the Territorial Legislature should pass an Act extending the county lines around these Indian reservations, or dividing them into unorganized counties, we

might have the residents of these Indian reservations paying tribute to one county for taxation purposes and attending the Courts of another organized county, for judicial purposes. This is certainly inconsistent.

The case of the *United States, ex rel. C. K. Davis vs. John Shank and another*, 15 Minnesota Report, p. 369, and West Publishing Company's edition, p. 302, is an exact adjudication of the question here under discussion and is a question arising under the state law where every presumption is in favor of the jurisdiction of the state legislature and against the jurisdiction of Congress. McMillan, judge, wrote the opinion and the Court holds that the State laws of descents and distribution does not run in an Indian Reservation and that the property of an Indian, although he was also a citizen of the United States, could not be administered under the State law in the county of which such Indian reservation was a part and around which the county lines of the county were actually extended.

In the opinion the Court say:

"The said Court, therefore, having no jurisdiction, it is not for us to look farther. If it were necessary to find a jurisdiction, we might find it in the United States government, which has under the constitution, power to regulate commerce with these Indian tribes, and who although separate nations, are under the protection of the general government, (Story, Const., Section 110, and authorities cited), and the immediate superintendence of its officers and agent, or in the Indian tribe to which the deceased belonged."

We are not unmindful of the decision of this court in *United States vs. Pridgeon*, 153 U. S., p. 48, decided in

this court April 16th, 1894. In that case, however the contemporaneous construction of the various departments of government and the different provisions of the Organic Act do not seem to have been presented to this court or considered, and notwithstanding the decision in that case the courts of the Territory, the officers of the Territory and the officers of the general government have continued to administer the law the same as if that decision had not been rendered.

## II.

**Because said Indian Reservations, under the statutes of the United States, are authorized to be leased by the Osage and Kaw tribes of Indians for grazing purposes, and the taxation of cattle kept and grazed on said Indian Reservations is a direct tax upon the right of the Indian tribes to lease the same, and decreases, to the extent of the tax, the grazable value of the Indian Lands.**

The Osages and Kaws own their lands and hold them as a tribe.

The Osages hold their lands by virtue of several treaties with the United States, and an agreement made with the President of the United States in conformity with such treaties.

Article 16, of the Treaty of Sept. 29, 1865, 14  
U. S. Stat. at Large, p. 690.

Section 12, of the Act of July 15, 1870, 16  
U. S. Stat. at Large, p. 362.

Act of June 5, 1872, 17 U. S. Stat. at Large,  
p. 228.

Section 1 of the Organic Act provides, among other things:

"That nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory, under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians."

From the time of its organization it has been a settled policy of the government to protect the Indian tribes in the use and free enjoyment of their property, and general provisions have been inserted in treaties and agreements with the Indians, prohibiting white men, except government employes, from residing among the Indians or trading with them in any way. These lands belong to them, have been paid for with their money, and the tribes are entitled to the use and occupancy thereof. Anything that has a tendency to deprive them of the full use and benefit of their lands, or to fix any servitude thereon, is against the policy of the government and detracts that much from the rights of the Indians themselves. Following out the policy of the government, Congress, by the act of February 28, 1891 (26 U. S. Stat. at Large, p. 794, sec. 3), provided as follows:

"That where lands are occupied by Indians, who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of said

reservation may recommend, subject to the approval of the Secretary of the Interior."

The petition (pp. 9 and 10 of the record) charges that the Kaw and Osage Indian reservations are comprised wholly of lands owned, paid for and occupied by said Indian tribes, and have been leased to these plaintiffs for grazing purposes by the Osage and Kaw Indian tribal governments under the supervision of the agent in charge of said tribes, and with the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, for grazing purposes, as provided by said Act of Congress. These plaintiffs have complied with the requirements of the Act. They are not trespassers upon the rights of the Indian in holding these cattle on these Indian reservations for grazing purposes. They could not be there except under authority of the Act of Congress above mentioned. They are there under the sanction and protection of that authority that has to deal with the Indians. The lease money is paid to the Indian tribes themselves, and goes to the tribe as a tribe, and into the national treasury of the tribe. Can the Territorial Legislature, under the provisions of the Organic Act and this Act of Congress, by the enactment of a tax law, interfere with this right granted by Congress to the Indian tribe, to derive a revenue from the use of their lands? So far, when a white man has stepped within the borders of these Indian reservations and committed a crime, he has been construed to have violated no law of the Territory and to have violated only the law of the United States, and the only effort that has been made by any department of government to extend the laws of the Territory into *this*

country is this effort made by the Territorial Legislature to extend into this country the hand of the tax-gatherer.

This property that is sought to be taxed is personalty. It follows the domicile of the owner, and may be taxed at the domicile of the owner, and this petition charges that already the greater portion of this property has responded to the claims of the tax-gatherer in the jurisdiction from whence it came. If the owner of this property should die, it would not descend under the laws of the Territory, but would descend and be distributed according to the laws of the domicile of the owner. Is not the taxation of this property that is brought into these Indian reservations, under the provisions of the act of Congress, for the purpose of grazing upon Indian lands, an additional servitude that decreases the usable value of the lands and impairs the rights of persons and property pertaining to said Indians? Does it not operate to fix the rental value of these lands to the same extent that it would if it were a tax upon the land itself? Does it not, and will it not, decrease to the same extent the income of the tribe from the use of these lands. It goes without saying, and we need not cite authorities to this court, that the legislature would have no power to tax these Indian lands; or, for that matter, that the legislature of Oklahoma has no power to tax the personal property of the Indians. How can it do indirectly what it cannot do directly? Has the Legislature of Oklahoma the power to place upon these Indian tribes this additional servitude and take this money out of the treasury of the tribes, under the guise of a tax on the cattle that graze on these lands, when it amounts to the same thing?

In the case of *Pollock vs. The Farmers' Loan and Trust Co.*, 157 U. S., 429, the fifth and sixth points of the syllabus are as follows:

"A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States."

"A tax upon the income derived from the interest on bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and is consequently repugnant to the Constitution of the United States."

In the opinion at page 555, Mr. Chief Justice Fuller says:

"The contention of the complaint is:

"*First.* That the law in question, in imposing a tax on the income or rents of real estate, imposes a tax upon the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property held for the purpose of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated."

And in the opinion, at page 580, *et sequens*, Mr. Justice Fuller says:

"If the constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income? \* \* \* \* \*

"The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands, is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annul tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rental or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Patterson observed in *Hylton's case*, 'land, independently of its produce, is of no value;' and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court. Thus in *Brown vs. Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on the

imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

In the same case on rehearing; 158 U. S. 601, the fourth and fifth points of the syllabus are as follows:

"Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."

"Taxes on personal property; or on the income of personal property, are, likewise, direct taxes."

And in the opinion, after a reargument of the whole matter, and a full discussion of the subject, the Chief Justice summed up his conclusions as follows:

"Our conclusions may, therefore, be summed up as follows;

"*First.* We adhere to the opinion already announced, that a tax on real estate being undisputably direct taxation, taxes on rents or income of real estate are equally direct taxation.

"*Second.* We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxation."

From the above case it is clearly illustrated that a tax on the rents or income of real estate is a direct tax. We do not think it is necessary, in order to determine the tax herein sought to be levied to be illegal, that it should be held to be a direct tax.

If it is a tax at all, even an indirect tax, upon the income of the Indians from the use of their lands under

authority of the Congress of the United States, it is certainly not within the power of the Territorial legislature,

### III.

**The said Act of the Legislature is Unconstitutional and void in that it confers upon the Supreme Court of the Territory of the right to fix taxing districts, which is a Legislative Function.**

Section four of the Organic Act provides: "That the legislative power and authority of the Territory shall be vested in the Governor and Legislative Assembly."

Section six of the Organic Act provides that "The legislative power of the Territory shall extend to all rightful subjects of legislation." No one denies but what the subject of taxation, within the proper limits, and exercised in conformity with the provisions of the law, is a rightful subject of legislation.

Cooley, in his work on Taxation, second edition, page 149, says:

"The power to determine what shall be the taxing district for any particular burden is purely a legislative power."

Under the title of "Constitutional Law", in Volume 3, of The American & English Encyclopedia of Law, it is declared:

"It is an established principle of constitutional law that the power conferred upon the legislature to enact laws cannot be delegated by that department to any other body or authority."

Mr. Cooley in his work on Constitutional Limitations, at page 137, says:

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Again, Mr. Cooley, in his work on Taxation, second Edition, p. 61, says:

"It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which prevades our whole political system, and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power."

In *State, ex rel. Munday, vs. Assessors of the City of Rahway*, 43 N. J. Law, p. 339, the fifth and sixth points of the syllabus are as follows.

"The supplement to 'An Act for the better regulation of proceedings upon writs of *mandamus*,' approved March 3, 1880 (*Pamph. L.* 1880, p. 102), requires the court, before issuing such writs to compel the levy of a tax for the payment of municipal debts, to determine the highest rate of taxation capable of being imposed on the municipality without injury to the interests of the creditors of the

corporation whose claims are not yet due, and forbids the court to direct the levying of any more than the rate will produce. Before the passage of this statute the relator was a creditor of the City of Rahway, the authorities of which had ample power to levy taxes to pay his debt. *Held*, That the enforcement of the law would deprive him of his constitutional remedy, and hence, as to him, the statute was invalid.

"This statute is unconstitutional, also, because it aims to devolve upon the judicial department of the government an exclusively legislative function pertaining to the taxing power—the duty of determining the highest rate of taxation which can be borne by a municipality without injury to its creditors at large."

In the opinion, at page 348, Dixon, Judge, says:

"Courts can determine whether constitutional or legislative restraints and rules as to taxation have been observed, and whether any individual is called upon to pay more than his due proportion, and can compel subordinate legislative bodies to exercise the powers conferred upon them for purposes of taxation, but never has it been held that they could either assume or control the legislative function of deciding what sums the public interests require or permit to be raised."

As bearing upon this question also see the following authorities:

*C. W. & Z. Railroad Co., vs. Commissioners of Clinton County*, 1 Ohio State p. 77.

*The Auditor vs. Holland etc.*, 14 W. P. D. Bush (Ky.) 147.

*Brown vs. Fleischner*, 4 Or. 132.

*State ex rel. Luley vs. Simons*, 32 Minn. 540.

*Ex Parte Wall*, 48 Cal., 279.

*Lamb et al. vs. State*, 11 Ind., 484.

*Maize vs. The State*, 4 Ind., 342.

- Parker vs. Commonwealth*, 6 Pa. St., 507.  
*People vs. Stout*, 23 Barb. (N. Y.), 349.  
*Bradley vs. Baxter*, 15 Barb. (N. Y.), 122.  
*Bartoe vs. Himrod*, 8 New York, 483.  
*Stat. vs. Hudson County Avenue Commissioners*, 37 N. J. Law, 12.  
*People vs. Collins*, 3 Mich. 343.  
*O'Neil vs. American Fire Ins. Co.*, 166 Pa. St.,  
 72; same case 30 Atl. Rep. 943.  
*Anderson vs. Manchester Assurance Co.*,  
 (Minn.) 63 N. W. Rep. 241.  
*Doherty vs. Ransom County*, (N. D.) 63 N. W.  
 Rep. 148.  
*Parks vs. Board of Com'rs Wyandotte Co.*,  
 61 Fed. Rep., 436.  
*Board of Com'rs Wyandotte County vs. Abbott*,  
 (Kan.) 34 Pac. Rep., 416.  
*Dougherty vs. Austin*, (Cal.) 29 Pac. Rep., 1092.  
*People vs. Johnson*, (Cal.) 31 Pac. Rep. 611.

In fact there seems to be no conflict in the authorities upon the proposition that the legislature cannot delegate its functions to any other authority, and the question in the case at bar is whether, by the Act in question, the legislature has delegated its functions to the Supreme Court of the Territory.

The Supreme Court of the Territory is authorized to define the judicial districts, and to attach to organized counties any unorganized country, district or reservation, for judicial purposes. This authority is conferred upon the Supreme Court by the Organic Act and is clearly within the power of Congress; in fact, Congress might have vested in the Supreme Court of the Territory

legislative functions and entirely done away with the legislative assembly. But it did not see fit to do this.

The Act by which this property is sought to be taxed is Article 6, of Chapter 43, of the Session Laws of 1895, at page 232, and Section 1 provides:

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes."

Judge Tarsney, in his opinion (record, p. 36), meets this question as follows:

"Another contention of the plaintiffs is that this taxation is unconstitutional and void because it rests upon the attempt of the Supreme Court or the Territory to fix taxing districts, which is a legislative function. The answer to this proposition is that the Supreme Court of the Territory has not attempted to fix any taxing districts; that that Court, under the powers expressly invested in it by the Organic Act of the Territory, in 1894 attached this reservation and unorganized country to Kay County for judicial purposes, and not for the purpose of taxation; that the taxing districts in which these taxes were imposed and levied *was* created and fixed, *not* by the Supreme Court, but by the legislature in the act of 1895, the language of the act being:

"'That when any cattle are kept or grazed,' etc. \*  
\* \* It was by this act that a taxing district was created, and not by the order of the Court.'"

It was not contended in the argument of this case on its presentation to the Supreme Court of the Territory that the Supreme Court of the Territory had fixed this taxing district, *but it was contended* that the act vested

in the Supreme Court the power to fix taxing districts, and that, in the exercise of its power, conferred by the Organic Act, to attach any unorganized country, district or reservation to an organized county for judicial purposes, which it had the right to do at any time, it would thereby in the future fix taxing districts, and that the taxing districts followed, under this act, in the future, any order that might be made by the Supreme Court of the Territory in changing the boundaries of judicial districts. And this has been exemplified by the Supreme Court of the Territory, and we now have an object lesson. July 30, 1897, at its June session, the Supreme Court of the Territory made the following order, which has been duly entered of record:

"It is further ordered that the Osage and Kansas reservations are hereby attached to Pawnee County, Oklahoma Territory, for judicial purposes, and such reservations are declared to be a part of the Fourth Judicial District of the Territory of Oklahoma."

Every step for the taxation of property in that part of the Indian reservations north of the township line dividing townships twenty-five and twenty-six, being that part attached to Kay county at the time this suit was instituted, has been taken this year and all that territory included within this litigation has been taken by this order of July 30th, and attached to Pawnee County. Now, where, may we ask, are the taxes for the year 1897 to be paid?

The statute was not made for the year 1895; it is an enduring statute, and continues until it is repealed by the Legislative Assembly. And the Supreme Court will continue from time to time to change the jurisdiction in these reservations, by taking from one organized county

and attaching to another, as the convenience of the Court may require. And when it does this, under the Act in question, it exercises the legislative function of fixing taxing districts, and thereby the legislature has abdicated its powers and delegated to the Supreme Court the right to fix taxing districts. This is not a case of the delegation of necessary powers to municipal corporations, city councils and the like. It is not the making of an Act to take effect upon the happening of some contingency which is complete in and of itself; but it permits the Supreme Court, by its orders, to pass the necessary legislation to fix the taxing districts so far as these Indian reservations are concerned. And within every authority that we have been able to find it is a delegation of legislative power to the Supreme Court of the Territory, by the Legislature of this Territory; and, if it is a delegation of legislative power to the Supreme Court of the Territory, it renders such legislation void.

#### IV.

**Because the Act of the Legislature of the Territory under which these taxes are sought to be levied is void for the reason that it attempts to tax property situated in said Indian reservations for the benefit of the counties to which they are attached for judicial purposes, the owners and holders of the property on these Indian reservations having no interest in the taxes gathered by either of said counties or by the Territory; no voice**

in their expenditure, and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking the property of persons holding property on said Indian reservations for the benefit of the residents of said counties and is taking private property for private purposes.

The Act of the Territorial Legislature does not attempt to make any part of these Indian reservations a part of the organized counties. It simply provides that "cattle kept or grazed, and any other personal property situated in any unorganized country, district or reservation, shall be subject to taxation in the county to which such country, district or reservation is attached for judicial purposes."

It is an arbitrary declaration that "cattle kept or grazed, and any other personal property" situated in one jurisdiction shall be taxed in another.

The Supreme Court of the Territory, being divided in opinion, *held*, that all the taxes levied under the Act by the county authorities, except for the purpose of court expenses, were invalid, and that the taxes levied for court expenses, and the Territorial levies, were valid.

Inasmuch as the whole case is here by appeal and cross appeal, we will treat the question in this brief in its entirety.

Under the Act the taxes are assessed for the benefit of the organized county. The levies are made by its

officers. The money collected by them is expended for the benefit of the organized county.

Five mills to pay the salaries of the officers who perform no services for the residents of these Indian reservations, in whose election they have no voice, and to whom these officers are not in any way responsible.

For contingent fund, three mills to pay the contingent expenses of the organized county, of which these Indian reservations form no part, and in the expenditure of which the owners the property sought to be taxed in this litigation do not participate.

For a sinking fund, one and one-half mills. Certainly the owners of this property, and the residents in these Indian reservations did not assist in creating the debt for the payment of which this sinking fund is provided. They have received no benefit from it. Not a dollar of it was occasioned by them or in their interest, and if the the inhabitants of these Indian reservations may be made to contribute to this sinking fund, why may they not be required to pay all or any portion of the debts created by the organized County?

For County supplies, three mills. Who uses these supplies? None of the supplies are distributed to the residents of these Indian reservations.

For road and bridge fund, two mills. What voice have the residents of these Indian reservations in the expenditure of this fund? What right have the officers of the organized County of Kay to expend this fund in these Indian reservations? The jurisdiction of the officers of Kay County does not extend beyond the limits of the organized County. It was urged at the trial that

the residents of these Indian reservations, when they come into Kay County, travel upon these highways. If they do, we would suggest that they enjoy them in common with the rest of mankind who live in other States and Territories of the Union. And it might be suggested that if the inhabitants of the organized County of Kay travel in these Indian reservations, they travel the highways that are kept in repair by the voluntary contributions of the residents of these reservations.

For County poor fund, one mill on the dollar, which is equally without benefit to the residents of these Indian reservations. The poor, if any there be in these Indian reservations, are not cared for by the authorities of Kay County.

For county school fund, three mills on the dollar. This fund, when gathered under the law of the Territory, is distributed to the various school districts of the organized county, according to the number of children in the district of school age. The county officers of Kay County have no authority to distribute any portion of this fund to the support of schools in these Indian reservations, and no authority to establish such schools therein.

For court expenses, two and one-half mills on the dollar. And herein is the stumbling block to the Court below.

Because parties *found* on these Indian reservations may enjoy the luxury of being sued in these Courts, the Court below held they should bear the burden of Court expenses for Kay County.

Under the construction given by the various departments of government, and the Courts of the Territory,

crimes committed by white men in these Indian reservations are violations of the laws of the United States, and prosecuted by and at the expense of the United States. Certain specified crimes committed by Indians may be prosecuted on the Territorial side of the Court, but the United States pays the expenses. In civil cases the fees are paid by the litigants. The owners of this property are not protected by the laws of Oklahoma as the residents of the organized counties are, and outside of the luxury of being *found* so that they may be sued they receive the same benefit, and only the same benefit, that citizens of other States and Territories, receive, and not so much benefit as is received by the organized counties of the Territory that have no Indian reservations attached; and there would be as much reason in requiring Logan County to contribute to the payment of the Court expenses of Kay county as to require the residents of these reservations to contribute thereto.

The fact is that the courts of any country are open to all comers, as the highways are open to all travelers, and if the residents of these reservations receive any protection from these courts, they receive it under the Organic Act, and not under any law of the Territory.

Authorities heretofore cited.

All of the reasons urged against these county taxes apply with equal force to the taxes for territorial purposes.

The facts present a plain case of taxation without benefit. The legislature might just as well have said that, for the purpose of helping out the residents of Kay County, a special assessor should be appointed to make

an assessment upon the residents of Logan County, and require them to contribute to the public institutions of Kay County. Why not? The residents of Logan County are as much within the jurisdiction of the officers of Kay County as are the residents of these Indian reservations. They have just as much voice in the election of the officers who have charge of the municipal affairs of Kay County as do the residents of these Indian reservations. They receive just as much benefit therefrom, and more, because they receive the protection of the laws of the Territory.

It is urged that taxation is a question of legislative discretion, and that the courts cannot interfere with that discretion, and Justice Tarsney, in his opinion, expressing his own view, says (record, p. 32):

"If such discretionary power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency that elected them. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons or with regard to property, but if it do not clearly violate some established rule of limitation, the responsibility of the legislature is not to the courts, but to the people by whom its members were elected."

If the Courts cannot curb the legislative discretion—if they have the right by legislation to tax whom they will, when they will, and where they will—then an Act requiring the residents of Logan County to contribute to the support of Kay County would be a valid exercise of power.

It is true that many cases may be found in the books

in which the broad declaration is made that taxation is a matter of legislative discretion. But such declaration cannot be found in any case where the facts are parallel to the facts in the case at bar. Such declaration can only be found in cases where every element of jurisdiction is complete, where the person whose property is taxed enjoys the equal protection of the laws with any other person whose property is subject to like taxation, and who receives substantially the same benefit.

The legislature cannot place upon the property of a County alone a burden which belongs to the State. It cannot place upon one County the burden which belongs to another, nor can it require the entire property of the State to bear a burden that properly belongs to one of its subdivisions. This principle applies with the same force to subjects of general taxation as it does to matters of local improvements.

Mr. Cooley, in his work on Taxation, Second Edition, p. 140, says:

"Taxes are collected as *proportionate* contributions to public purposes. But to make them such in any true sense, they must not only be such as between the persons called upon to pay them, but also as between those who *ought* to pay them. It is therefore of prime necessity in taxation that it should first be determined what public—whether State or local—should bear the burden, and that it should then be imposed ratably as between those who constitute that public. If a single township were to be required to levy upon its inhabitants and collect and pay over to the State whatever moneys were necessary to pay the salaries of the several State officers, it would be apparent, 'at first blush,' that the enactment was not one which, either in its purpose or tendency, was calculated to make the tax payers of that township contribute only

their several proportions to the public purpose for which the tax was to be levied. If, on the other hand, for the purpose of purchasing and ornamenting a city park or any other improvement of mere local convenience, a tax should be imposed upon the whole State, it would be equally manifest that equality and justice were not the purpose of the imposition, but that, if carried into effect, the people of the State not residing in the city would be compelled to contribute to a purpose in which, in a legal sense, they had no interest whatever."

Mr. Chief Justice Bigelow, in *Dorgan vs. The City of Boston*, 94 Mass., p. 237, says:

"In requiring that taxes should be proportional and reasonable, the framers of the Constitution intended to erect a barrier against an arbitrary, unjust, unequal or oppressive exercise of the power. *Oliver vs. Washington Mills* 11 Allen, 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power, not warranted by the Constitution, against the exercise of which a person aggrieved might sue for protection."

And Mr. Cooley, at page 141, after quoting the above extract from the opinion of Chief Justice Bigelow, says

"And it is no more incompetent to select classes of

persons for exceptional burdens than it is to select districts of the state for that purpose.

"The cases suggested are extreme cases, but the principle that controls them is universal, and a disregard of it is fatal to the tax; and whether the unjust consequences are slight or serious is unimportant. Where the principles of taxation are disregarded, everyone is entitled to claim strict legal right; for in no other way can the power be restrained from perversion and oppression. \* \* \* \* \*

"To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties. 'By taxation,' it is said in a leading case, 'is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or class of people to another.' This principle has met with universal acceptance and approval because it is as sound in morals as it is in law."

Again, at page 144, Mr. Cooley says:

"In cases where the character of the work, as local or general, is plain, the rule of right is clear. If a single locality were to assume to tax itself, or the state were to undertake to tax it, for the construction of a state work or the erection of a state building, no one could hesitate for a moment in saying there was no such right, and that there could be none so long as taxation by the funda-

mental law is required to be laid by fixed rules, and is not subject to the arbitrary caprice of legislative bodies. A county has therefore no Constitutional authority to lay a tax for a county building on a part of its towns only; neither has it authority, when it has contracted a debt for a county purpose, to levy a tax for the satisfaction of the debt on such part of the towns only as its governing board may think ought in equity to pay it."

In *Hammett vs. Philadelphia*, 65 Pa. St., p. 151, it is said:

"There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of the provisions of the Bill of Rights, everything in which is 'excepted out of the general powers of the government, and shall forever remain inviolate.' There is no case to be found in this state, nor, as I believe after a very thorough research, in any other—with limitations in the Constitution or without them—in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation."

Again, at page 153:

"In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public purposes without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

The opinion in this case is extensive, and a very instructive one upon the questions involved.

Mr. Chief Justice Robertson, in *Lexington vs. McQuillan's Heirs*, 9 Dana (Ky.), at page 516, says:

"An exact equalization of the burden of taxation, is unattainable and *utopian*. But still there are well defined limits, within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal; but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and, if a tax be laid on land, no appropriation land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The legislature, in the

plentitude of its taxing power, can not have constitutional authority to exact from one citizen, or even one County, the entire revenue for the whole commonwealth.

"Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally, without the consent of the owner or owners, or without retribution of the value in money.

"The distinction between constitutional taxation, and the taking of private property for public use by legislative will, may not be definable with perfect precision. But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent members of the same community generally, as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government.

"When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden."

In the case of *Sharpless vs. The Mayor of Philadelphia*, 21 Pa. St., p. 174, Black, Chief Justice, in summoning up the case, among other things, says :

"By taxation is meant a certain mode of raising revenue for a public purpose in which the community that

pays it has an interest. The right of the State to lay taxes has no greater extent than this.

"An Act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the assembly by the general grant of legislative authority."

In the case of *Washington Avenue*, 69 Pa. St. Agnew, Judge, in the opinion at page 361, *et seq.*, says:

"To apply it to the country and to farm-lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush, every one would pronounce it to be palpably unreasonable and unjust. Judged of by this rule for deciding in a question of constitutional power, the law in this case cannot stand. \* \* \* \*

"I admit that the power to tax is unbounded by any express limit in the Constitution, that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further that all derive benefit from the purpose to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon people in districts and by turns, but still it must be public in its purpose, and reasonably

just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

In the case of *Taylor McBean & Co. vs. William R. Chandler, et al.*, 9 Heiskall, 349, the Court in the syllabus fully states the law as laid down in the opinion, and the opinion ably supports the doctrine laid down in the syllabus.

The syllabus of the case is as follows:

"1. *Principia.* The power to impose and collect taxes is essential to governmental organization; and is inherent in American governments, state and federal, with written constitutions in which powers are created and defined, and duties disposed and distributed among the several departments in their various functions. To discharge the charges incident to the exercise of the powers and the performance of the duties prescribed in the Constitution of Tennessee, the power of taxation is assigned to the Legislative department. In the employment of this power the Legislature must be restrained by the regulations imposed in the Constitution, and it devolves upon the Judiciary to determine whether it has exceeded these limitations. Taxation is a mode of raising revenues for public purpose only, and must be laid according to some rule of apportionment. Equality is of the essence of the power; therefore, a State burden cannot be placed upon any territory less than the entire State, nor a County burden upon territory greater or smaller than the County. If the tax be laid upon one of the municipal subdivisions of the State alone, its purpose must not only be public, as regards the people of that municipality, but also local. These principles are fundamental, and inherent as conditions in the power to

impose every burden which taxation is to provide—and, only when they are observed, does the Legislature exercise legitimate authority.”

In *Mayor and City Council of Baltimore vs. Hughes, Administrator*, D. B. N., 1 Gill & J., p. 491, Buchanan, Chief Justice, discusses the question here under consideration as follows:

“A recovery by the plaintiffs of the taxes imposed under the 13th section of the ordinance of the 9th of March, 1807, is resisted by the defendants on two grounds:

“*First.* That the power given by the ordinance has not been well executed.

“*Second.* That the ordinance itself is not authorized by the charter.

“The second ground relied upon involves the construction both of charter and the ordinance, and will be first examined. \* \* \*

“But where an ordinance provides for the paving of a street, etc., in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears to be, by the ordinance, for the general benefit of the city and not for the benefit of the particular district such an ordinance is not in pursuance of the authority conferred by the charter, and is void.”

*Dyer vs. Farmington Village Corporation*, 70 Me. 522.

*Sutton's Heirs vs. City of Louisville*, 5 Dana (Ky.) p. 528.

Mr. Burroughs, in his work on taxation, section twenty-six, says;

“It is not in the power of the legislature, under the guise of taxation, to give the property of A. to B., or to impose the whole burden of a tax for the State upon one

person or upon one county. Such absolute, arbitrary powers have no place in a government regulated by law.

"In local taxation, there must be some benefit to the people of the locality not common to all the people of the state; if it be for a town or county it must be for a purpose common to the people of the town or county, and of peculiar benefit to them.

In the case of *Ex Parte Marshall*, 64 Ala. 266, the question under consideration is discussed, and the case, so far as it is responsive to the question now under consideration, is as follows:

"1. License tax, as revenue law, or police regulation—A revenue law, imposing a license tax on an occupation or business in an incorporated city or town, for the benefit of the county, or other larger Territorial district in which it is situated, is violative of that equality of taxation which is a fundamental, constitutional principle; but, as a police regulation, the price of such license may be regulated by the populousness of the community in which the privilege is to be exercised, and the profitableness of the business.

"STONE, J.: 'My opinion is, that a rule *nisi* should be awarded in this case. The taxes and assessments, authorized by the act 'To regulate the system of public schools in the county of Mobile,' approved January 16th, 1854, although some of them are laid on occupations usually assessed by license, are, nevertheless, simply taxes for revenue purposes.—Pamph. Acts 1853-4. page 190; Ib. 235. The purpose of each act was to aid in the support of the common schools throughout the whole, the benefits of which are distributed and enjoyed throughout the County. Yet, in the 4th section, subdivision 3, of the first named Act, it is provided: 'The following license taxes shall also be collected by the Judge of Probate of Mobile County, for the use of said Mobile school com-

missioners: \* \* \* To authorize the retailing of spirituous liquors in the City of Mobile, fifty dollars.' This is a clear case of levying a tax from a limited area, the City of Mobile, to be used and disbursed in the maintenance of the common schools over a much larger area, the County of Mobile. And, speaking of the levy of these license taxes, in the Act, approved February 14, 1854, (page 235), the legislature declared 'that the purpose of the Act, in affixing rates of licenses, was not to authorize any of the employments, amusements, games, sports, tables or alleys, but to impose an additional tax thereon.' These extracts show clearly, to my mind, that the purpose of this levy was revenue—revenue for the support of the common school system of Mobile County—and not a police regulation of the traffic in spirituous liquors. We have, then, in the case of the lax levied in one community, for the benefit, not alone for that community, but for the common benefit of that and a much larger community, not similarly taxed. It will not be denied that this extra-license tax, if its purpose simply be revenue, is violative of the fundamental constitutional principle on which the right of taxation rests."

Cooley on Taxation, 128-9; Ib. 396.

Barrroughs on Taxation, 68; Ib. 392.

*Durack's Appeal*, 62 Penn. St. 491.

*Washington Avenue*, 69 Penn. St., 352.

*Lin Sing vs. Washburn*, 20 Cal., 534.

In *Tidewater Co. vs. Coster*, 18 New Jersey Eq. 518, the fifth point of the syllabus is as follows:

"To compel the owner of property to bear the expense of an improvement except to the extent of his particular advantage, is, *pro tanto*, to take private property for public use without compensation."

In the opinion, at page 526, the Chief Justice says:

"But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: No provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. \* \* \*

"Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto* will be taken for public use without compensation."

And, again, at page 531:

"That principle is one of great importance; for if the burthens of the community can be thrown upon a smaller class, whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability, on the part of the community, to confiscate, for its own purposes, the property of the citizen. Such power has not, by the Constitution of this State, been placed in the hands of the legislature; and as the act in question has, in the particular adverted to, exercised such power, it is in my opinion void."

Mr. Desty in his work on Taxation, page 26, says:

"If a tax is laid on a municipal subdivision, the purpose must not only be a public purpose as regards the people, it but must also be local. It is of the essence of taxation that it should compel the discharge of the burden by those upon whom it rests, and an attempt to com-

pel a county to pay a charge properly resting on the whole state would be unconstitutional. Where a public improvement is for the general benefit of the whole city, a tax on the persons and property of a particular district is void. A law which would attempt to make one person, or give a number of persons, under the guise of local assessment, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

Mr. Black in his Work on Constitutional Law, page 328, says:

"But it is not consonant with the constitutional idea of a tax that it should be exacted from individuals in an arbitrary or discriminating manner. The idea of taxation implies equality of burdens, and a regular distribution of the expenses of government among those persons, or those classes of property, which are rightly subject to the burden of them. Taxes, properly so called, are distinguished from arbitrary exactions or enforced contributions in this, that taxes must be laid according to some rule which apportions the burden of the tax between the subjects which are to contribute to it. An exaction which is made without regard to any rule of apportionment is not properly a tax, and such an exaction is not within the constitutional power of the government."

Again, on page 329 and 330, Mr. Black says:

"But in this country the taxing power is subject to certain positive limitations, within which its exercise must be confined, in order to answer the requirement of legality. 'Great as is the power of any sovereignty to levy and collect taxes from its citizens, it is not in a constitutional country without limitations which are of a very distinct and positive nature and exist whether declared or not declared in the written Constitution; but some of them it is not uncommon to specify, either out of abundant

caution, or to keep them fresh in the minds of those who administer the government. Some others in this country spring from the peculiar form of the government and the relation of the states to the common authority. Still others are expressly imposed, either by the state Constitution or by that of the Union.' "

And, again, on page 330, Mr. Black says:

"This limitation upon the taxing power is not expressed in the Constitutions, but is to be implied from the nature of our system of government. No political community can in general lay assessments upon any subjects of taxation not within its territorial jurisdiction."

And, again, at page 338, Mr. Black says:

"And so again a tax cannot be imposed exclusively on any subdivision of the State to pay an indebtedness or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. In other words, if the tax be laid upon one of the municipal subdivisions of the State alone, the purpose must not only be public, as regards the people of that municipality, but also local."

In the case of *Wells vs. The City of Weston*, 22 Mo. 384, the syllabus is as follows:

"The Legislature cannot authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits."

In the opinion, at page 388, Leonard, Judge, says:

"It is true, the Legislature possess the uncontrolled power of taxation, with the single limitation that 'all property subject to taxation shall be taxed in proportion to its value;' and this authority to tax, they may undoubtedly delegate to subordinate agencies, such as County tribunals and municipal corporations, to be assessed and applied locally; but here the attempt is to authorize a municipal corporation—charged with the sub-

ordinate government of persons and things within its limits, and having, as incident to this, the power to tax these persons and things for local purposes—to impose a tax upon the lands lying beyond its limits; or, in other words, arbitrarily, under the mask of a tax, to take annually from those who are without its jurisdiction a certain portion of their property lying within a half mile of the corporate limits; which we think can not be done.”

In the case of *Ryerson vs. Utley*, 16 Mich., at page 276, Chief Justice Cooley, in the opinion, succinctly states the law, as follows:

“It is of the essence of all taxation that it should compel the discharge of the burden by those upon whom it rests; and if the State should attempt to compel any single County by taxation to pay the salaries of the State officers, or the expenses of the Legislature, no one would for a moment doubt that while the act was arbitrary, unjust and tyrannical, it was also unconstitutional.”

In the case of *Cheaney vs. Hooser*, 9 B. Monroe (Ky.), p. 341, that part of the opinion responsive to the question under consideration is as follows:

“We come then to the third, and as we consider it the most serious objection, which alleges that the extension of the limits of a town, so as to include the adjacent land within the town, against or without the consent of the owners, and to subject the property and people within the added territory, to the jurisdiction and taxing power of the extended municipal government, without the consent of the added population, is in effect taking private property for public use, without the consent of the owners; and that if done without making or at least securing to them a just compensation, not merely in estimated advantages but in money, it is a violation of the constitutional provision on that subject. There being no express constitutional declaration or prohibition

directly applicable to the power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burthens, either general or local there is no clause to which the citizens can with certainty, appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use, without compensation. The general spirit of equality and the sense of justice which pervade not only the constitution but the community at large, and therefore, presumably, its representatives, would doubtless furnish guarantees ordinarily sufficient to prevent any flagrant departure from substantial equity in the imposition of taxes or other burthens, for the benefit of the State at large. Nothing but extreme excitement bordering on fury, would reconcile even a domineering majority, to an act which should impose on the minority the entire or a flagrantly disproportionate burthen in supporting the government or carrying on its public and general objects. But even this latter result might, to some extent, be indirectly or inadvertently produced with respect to burthens which ought to be general. And there is still more danger of its being done or authorized in those acts of legislation which being entirely local in their character and operation and not apparently calculated to affect injuriously, either persons or property, may attract little attention or interest beyond the immediate locality to which they relate. Such acts affecting local interests only, referring to local circumstances, controlled mainly by the local representation, and therefore, likely to be influenced by the majority of those interested, may, by their operation, not fully explained or comprehended, subject a few individuals or a single one, to burthens for the benefit of those alone who are to impose them, and for purposes in which the parties thus subjected have no such interest as should require contribution from them."

In the case of *State, ex rel., vs. Haben*, 22 Wis. 629, the first point of the syllabus is as follows:

"Money raised in a city, by taxation, for the purpose of erecting a high school building, cannot be diverted by an act of the legislature, without the assent of the city or its inhabitants, to the purchase of a site for a normal school in said city."

Mr. Chief Justice Dixon, in the opinion, at star page 665, says:

"The question then is: Was it competent for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a State normal school in the city? We are clearly of the opinion that it has not."

In the case of the *County Court of Madison County vs. The People of the State of Illinois*, on the relation of *The Toledo, Wabash & Western Railway Co.*, 58 Ill. 456, a case for *mandamus* to compel the issuance of certain bonds which had been voted to the railway company under the provisions of an act of the legislature providing:

"That if the county authorities shall be of the opinion that the road would be a special advantage to the inhabitants or owners of property in a particular strip, district or section of the county, and not of great advantage to the county at large, they may subscribe such sum as they shall deem proper to the capital stock, or as a contribution in aid of the railway company, and shall issue their bonds therefor as in other cases, which are declared to be valid and binding. And the county authorities are empowered and it is declared to be their duty, to take all

proper steps, to make all necessary rules and regulations for collecting the necessary revenue to pay the principal and interest out of, and upon the inhabitants and property in such strip, district or section, in the same manner as for the county at large." The strip, district or section is required to be specifically designated by the county authorities at the time of making such subscription.

In pursuance of this power the authorities of Madison county made a subscription on behalf of a portion of the county.

In the Supreme Court the *mandamus* was denied, and in the opinion Mr. Justice Walker, at page 462, after holding that the strip so set apart was not a municipal corporation, and that it could not be taxed, goes on to say:

"If, on the other hand it be claimed it is a debt against the county to be paid out of the property of this strip, then it is not uniform in respect to the persons and property of the county, and is repugnant to that section of the Constitution. The power to impose a corporate debt, or tax, on a portion of the persons or property of a corporate body, is expressly prohibited, and this law cannot be sustained under this provision.

"Again, a portion of the citizens, of a county, at an election confined to them, and from which the other citizens are excluded, cannot impose a debt upon the county."

In *Sleight vs. The People*, 74 Ill., page 47, the second point of the syllabus is as follows:

"A tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose."

Under an Act of the Legislature of Illinois in this case, the claim was made, and the court below held: "That the entire tax collected from the railway company for county and township purposes, in the several towns through which the road runs, should be paid to and set apart by the County Treasurer, as a sinking fund, to be applied *pro rata* in redeeming the principal of the bonds issued by the town of Weller and Galva," in Henry County, and in the opinion, Mr. Justice Scholfield, speaking for the Court, says:

"But the claim here made is for taxes actually levied and collected for county and township purposes, from the railway company, in the towns of Oxford and Clover. If this amount shall be taken, then there must necessarily be a deficiency, to that extent, in the county and township revenues, which will have to be supplied by additional taxation. The property liable to taxation in one municipality will thus be compelled to bear a burden of taxation imposed by the corporate authority of a different municipality, and this, too, without its consent, and in the absence of any presumptive corresponding benefits. The principle upon which alone this can be sustained is, that the legislature may, in its pleasure, impose debts upon counties and townships and require their payment, without regard to the wishes of the inhabitants and taxpayers of such counties and townships; for it is evident that the practical result is precisely the same, whether it is said the taxes levied for county and township purposes on the property of the railway company, in the towns of Oxford and Clover shall be set apart for the payment of the bonds issued by the towns of Weller and Galva, or that the county and these townships shall pay a sum equal to that amount, out of their revenues, for the same purpose. In either event, it is taking so much of the revenues of the county, and the towns of Oxford and

Clover, to pay the debts of the towns of Weller and Galva. But it has been repeatedly held by this Court that the legislature is powerless to impose a debt upon a municipality without its consent; and those cases must be deemed conclusive on the question involved here."

The case of *Morford vs. Unger*, 8 Iowa, p. 82, is a case in which the legislature of the State of Iowa authorized the City of Muscatine to take additional territory within the corporate limits of the city, and we respectfully invite the attention of the Court to the discussion of the subject in this case and to the review of authorities.

In the opinion, at page 94, Stockton, Judge, says:

"The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but that there are limits beyond which the legislative discretion cannot go."

In the case of *In the matter of Lands in the Town of Flatbush*, 60 N. Y. 398, the fourth point of the syllabus is as follows:

"It is not within the legislative authority to compel an adjoining town to be taxed for the payment of debts previously contracted by a city."

In the opinion, at page 406, Miller, Judge, says:

"There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The

government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous and oppressive, and cannot be tolerated. None of the acts in question, therefore, for the reason last stated, in any sense gave authority to the commissioners to impose the burden of the assessments made upon the town of Flatbush.

In the case of the *City of St. Charles vs. Nolle*, 51 Mo., 122, the syllabus is as follows:

"So much of the ordinance of the City of St. Charles requiring a license tax for wagons used for pay, as attempted to impose a tax upon wagons of outside residents engaged in hauling into and out of the city, was void as not being authorized by the charter of that city, and the legislature could give the city council no authority to pass such an ordinance. The tax being upon outside citizens and for the benefit of those living in the city, would be in effect, taking property for private use; that is, for the use of a particular community of which the outside citizens form no part."

The opinion delivered by Judge Adams is directly responsive to the syllabus and reviews several cases, and is an authority directly in point.

*Bromley, et al., Trustees, vs. Reynolds, et al.*, 2 Utah 525, was a case in which the legislature of Utah passed an Act providing that all the taxes collected upon a railroad running through any school district should be collected and one-half thereof paid to the county treasurer to be distributed to the other school districts in the county.

The tax collector collected the taxes on a railroad running through a school district and paid one-half of the sum to the county treasurer, in accordance with the Act. The trustees of the school district brought suit against the tax collector to recover the amount so paid to the county treasurer on the ground that property in one school district could not be taxed for the benefit of another school district, and in the opinion at page 529, *et seq.*, Emerson, Judge, speaking for the court, says:

"By the provisions of this law, each school district is made a separate taxing district for school purposes in that district. The funds in question were raised by a tax duly levied and assessed by the trustees of Echo school district, for the sole purpose of maintaining schools in that district. The trustees have no power to raise taxes in their respective districts for any other purpose. It is a local tax for a local purpose. Section 19 seeks to divert a portion of that tax or the funds raised therefrom to another purpose, and to distribute them in another taxing district, and is we think on that account invalid. It is in effect requiring the levying of a local tax for a general purpose. The following remarks by Sharswood, J., in *Hammett vs. Philadelphia*, 65 Pa. St. 146, are applicable to this case: 'There is no case to be found in this state, nor, as I believe, after a thorough research, in any other, with limitations in the Constitution, or without them, in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy a local tax for general purposes.'"

In *Bradshaw vs. The City of Omaha*, 1 Neb., 16, the fourth point of the syllabus is as follows:

"The Courts have jurisdiction to inquire and determine whether lands brought by the legislature within the

limits of a city, are justly subjected to taxes levied by it for its support; because that is a question of property and private right."

In the opinion, Chief Justice Mason, says:

"But it is a question of property and private rights, whether such lands should bear a burden or a share of a burden, for another's benefit. And therefore it may be a question for the determination of the Court."

*Langworthy vs. Dubuque*, 13 Ia., 86.

*Fulton vs. City of Davenport*, 17 Ia., 404.

*Buell vs. Ball*, 20 Ia., 262.

*Deeds vs. Sanburn*, 26 Ia., 419.

*Deiman et al. vs. City of Fort Madison*, 30 Ia., 542.

*Holden vs. James*, 11 Mass., 396.

In *Taylor vs. Porter and Ford*, 4 Hill (N. Y.), 140, Bronson, Judge, speaking for the Court, says:

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the Constitution can be cited in support of the power, and that is the 1st Section of the 1st Article, where the people have declared that, 'The legislative power of this State shall be vested in a Senate and Assembly.'"

*Wilkinson vs. Leland*, 2 Peters 627.

Mr. Chief Justice Story in the opinion at page 657, says :

"In a government professing to guard the great rights of personal liberty and of property, and which is required to legislate insubordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offense. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of Legislative authority, or ought to be implied from any general expressions of the will of the people."

*Fletcher vs. Peck*, 6 Cranch, 87.

Chief Justice Marshall, in the opinion at page 135, says:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where

are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."

To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

*Morse vs. Stocker*, 1 Allen, 150.

In the opinion at page 152 Hoar, Judge, says:

"The power of the Legislature over private property, under the Constitution, is certainly not absolute, and must be exercised under limitations which have been carefully guarded and defined; and it is one of the gravest duties of this Court to determine, in any case presented for its decision, whether those limitations have been exceeded."

Mr. Cooley, in his *Work on Constitutional Limitations*, sixth edition, 598, says:

"Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

*Loan Association vs. Topeka*, 20 Wall. 655.

Mr. Justice Miller, speaking for the Court, in the opinion at page 663, says:

"The theory of our Governments, State and National, is opposed to the deposit of unlimited power anywhere. The Executive, the Legislative and the Judicial branches of these Governments are all of limited and defined powers."

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Mr. Cooley, in his Work on Constitutional Limitations, page 606, says:

"When, therefore, the Legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised: First, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the Legislature must be held to have assumed an authority not conferred in the general grant of Legislative power, and which is therefore unconstitutional and void. 'The power of taxation,' says an eminent writer, 'is a great governmental attribute, with which the Courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.'"

*Territory vs. Daniels*, (Utah) 22 Pac. Rep., 159. is also a case in point.

The case of *Ferris vs. Vannier*, 42 N. W. Rep. p. 31, is cited by Justice Tarsney as the only case presented, directly in point, (record page 37) and the attention of

this court is respectfully called to the opinion of Thomas, Judge, in that case. The Supreme Court of Dakota, without division, *held* the county taxes illegal, Tripp, Chief Justice, and the rest of the Judges, except Judge Thomas, holding that the Territorial tax was valid. We submit that the argument made by Judge Thomas is founded in reason, and supported by the authorities.

Judge Tripp, in his opinion, makes a labored argument to show that the legislature is to be the judge of what property is subject to taxation. In effect he argues that when Congress says, "nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," it means that the legislature may provide that real and personal property shall be taxed in one county, and personal property alone may be taxed in another county, and that while there may be in the unorganized county real estate subject to taxation, and real estate in all organized counties of the Territory is taxed, it is not a discrimination in taxing different kinds of property to provide that in an unorganized county only personal property shall be taxed, and, therefore, the law taxing personal property in the unorganized county is a valid law, so far as the territorial taxes are concerned, but admitted that the legislature had no power to require the property situated in an unorganized county to contribute to the local charges for the benefit of the organized county; recognizing thereby all the authorities we have cited under this head of our brief on the subject of taxation without benefit.

There is a difference, too, under the laws of Dakota,

between an unorganized county and an Indian reservation. There, as here, the statute provided that property in one jurisdiction should be subject to taxation in another. It does not appear in that case that the unorganized county referred to was an Indian reservation and controlled by the provisions of an Organic Act, which, as before stated, has been construed by the Courts of the Territory, and all the departments of the government, to be a place under the absolute and exclusive jurisdiction of the United States. Judge Tripp urges that the legislature can make such exemptions as it sees fit.

From all the cases above cited we gather the doctrine that it is beyond the power of the legislature to tax one locality for the benefit of another.

It is held by all these cases that to tax one locality for the benefit of another is the taking of private property for private purposes, or is at least taking private property for public purposes, without compensation, and that it is beyond the power of the legislature to do this, even though there may be no express constitutional provision applicable to the case and to which such power is repugnant.

It is apparent that none of the property sought to be taxed under the Act in question is under the protection of the Territorial laws or within the jurisdiction of the County of Kay, or benefited by Territorial or county, or any other municipal organization.

The cases we have cited fix the limit beyond which the legislature may not go. They all recognize the doctrine that the legislature is vested with a large discretion in a proper case, which we concede—one that is neces-

sary in carrying out the purposes of the government—but as has been said in all these cases, when the legislature oversteps the boundary line and takes the property of one locality for the benefit of another, it ceases to be legislation and becomes a legislative decree, confiscating the property of one individual, for the benefit of another individual, or for the benefit of another community.

The dividing line between legitimate legislation and confiscation is drawn where the person sought to be taxed, or community sought to be taxed, has no interest in the community, and derives no benefit from the purpose for which the tax is levied.

The taxation here is not analogous to the taxation of the property of a married woman, who cannot vote, or of a minor, whose persons and property are both under the protection of the law of their domicile. Nor is it analogous to the taxation of the property of non-residents, whose property is under the protection of the law of its situs, and where taxation is sought to be invoked for the purpose of protecting his property and the support of the government of its situs.

Here is simply a bold declaration that property that is not situated in Kay County shall be taxed there, and that property that is not subject to the Laws of the Territory, shall be taxed for a territorial government that, practically, affords it no protection.

The Act itself is a recognition of the fact that this property is not deemed to be a part of the property of Kay County.

The last clause of the Act by which these taxes are sought to be enforced contains the following:

"*Provided*, That the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to which it is attached, or in estimating or limiting the same."

The legislature recognized the fact that Congress had delegated to the Supreme Court of the Territory the control over these Indian reservations, and the only thing the legislature has tried to do by the Act in question is to send into these Indian reservations the hand of the tax-gatherer to compel the people in these Indian reservations to contribute to the support of the government of Kay County, and relieve the residents of that county from bearing the burdens of maintaining their own county organization, and to relieve the people of the Territory, to that extent, from bearing the burdens of a territorial government, whose laws do not furnish any protection to the property situated in these Indian reservations, that has been taken there under the sanction of an Act of Congress authorizing the Indians to lease these lands for grazing purposes.

The case of *Fisher vs. Utah & Northern Railway Company*, 116 U. S., 28, is relied upon by appellant. In that case it appears from the opinion of Mr. Justice Field, that :

"A strip of land and several parcels adjoining it, forming a part of the reservation, were ceded to the United States for the consideration of \$6,000, to be used by the company and its successors or assigns as a right of way

and road-bed, and for depots, stations, and other structures. By an Act of Congress confirmatory of the agreement the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depots, stations, and other structures was granted to the company and its successors or assigns, upon the payment to the United States of the \$6,000; and on the condition of paying any damages which the United States or Indians, individuals or in their tribal capacity, might sustain, etc. \* \* \* \* \*

"By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed. The very terms on which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed."

It also appears in that case that the property sought to be taxed was situated in the County of Oneida, an organized county of the Territory of Idaho.

It is, therefore, not a parallel case with the case at bar.

The case of *Langford vs. Monteith*, 102 U. S., 143, is cited.

Of course, under the provisions of our Organic Act, judicial process may run into these Indian reservations, and that is all that is decided in the case of *Langford vs. Monteith*.

The case of *Maricopa & Phoenix Railroad Company vs. Arizona*, 26 Pac. Rep. 310, 156 U. S., 347, was also a case in which a right-of-way had been granted to a railroad company, through an Indian reservation. In the statement of facts, page 350, it appears that the tax was levied "upon all the property of said Maricopa and Phoenix Railroad Company situated in said county of Maricopa, and described as follows, to-wit: "The 24.16 miles of main track, with franchises and right-of-way," which shows that the railroad property was not only within the jurisdiction of the Territory, but was within the jurisdiction of the organized county; which is not the fact in the case at bar.

The case of *Torrey vs. Baldwin*, 26 Pac. Rep. 908, is also relied upon. In the statement of facts in this case it appears that "the questions raised by demurrer, and, as is stated in the certificate of the said district court: 'Whether the county of Fremont, *within the geographical boundaries of which is situated said Shoshone Indian reservation*, had in the year 1889, any right, authority or jurisdiction to assess for taxation and levy a tax upon the cattle and horses of the plaintiff, which were during all of that year kept and located upon the said Shoshone Indian reservation; and whether said cattle and horses of the plaintiff, as kept and located upon said reservation during that year, were subject to taxation in said county for that year. \* \* \*'"

In this case, the reservation was a part of the organized county of Fremont, and therefore the case is not applicable.

## V.

The said Act of the Legislature is void in that it is in conflict with the provisions of the Organic Act providing that the Legislature of the Territory "shall not pass any law impairing the right to private property, nor shall any unequal discriminations be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," and the said Act is also a discrimination in the taxation of the same kind of property, and violates the rule of uniformity in taxation.

Section 6 of the Organic Act of the Territory (26 Stat. at L., p. 84), among other things, provides:

*"No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."*

It is submitted that no more rigid expression of the rule of uniformity in taxation can be found in the Constitution of any State than that above quoted. It necessarily declares all private property located within the proper jurisdiction of the Legislature of the Territory to be subject to taxation, for no property could be omitted from taxation without making a distinction in

taxing different kinds of property. The expression, "subject to taxation," manifestly refers to all property except that which the Organic Act itself exempts, unless a necessary implication results in favor of public property and property devoted to educational, charitable and benevolent purposes. Whether such necessary implication exists is needless to inquire. It is also true, as remarked by Caldwell, J., in construing a similar passage in *N. P. Rld. Co. vs. Walker*, 47 Fed. 686: "The prohibition in the Organic Act against making any discrimination in taxing different kinds of property, necessarily implies a prohibition against any discrimination in taxing the same kind of property." It may be further remarked that the case does not present an exact parallel with the proposition to invalidate a law of a State Legislature under a permanent Constitution, where every presumption and every intendment is taken in favor of the law, even to the restriction of the language of the constitutional enactment. The Territorial government and its organic law is temporary. The Territorial Legislature acts under a statute conferring distinct powers and its acts do not partake to the same extent of that sovereign quality imputed to State Legislatures. In the Territorial government the real sovereignty subsists in Congress and not in the people. The rules of construction involved in the determination of the constitutionality of the law under a State Constitution, are to be relaxed in testing the validity of a law of a Territory under its Organic Act. The language made use of by the supreme law-making power for the Territory is not to be subjected to a restrictive construction, as is often done in construing State Constitutions.

We cannot study the course of State decisions in expounding questions of constitutional law under their constitutions without being strikingly impressed with the fact that excessive refinements are too often indulged in. In the light of our judicial history, what would there be left of the Federal Constitution if the State Courts had been its sole expounders? The answer is obvious. Nor is this result attributable to the dual character of our government, but is chiefly attributable to the narrow methods of construction too often adopted, not only in expounding the Federal Constitution but in expounding their own. They set the law in the prisoners' box and refuse to condemn it as infringing the Constitution until it has been convicted beyond all doubt, both reasonable and unreasonable. How often we encounter, in reading State decisions, as a preliminary to a hard case making bad law, that apologetic expression, "We cannot interfere with the action of a co-ordinate branch of the government without being clearly and fully satisfied that the legislature has transcended its power, and we therefore uphold this law, not because we are satisfied that the legislature has acted within the scope of its powers, but rather because we are not clearly satisfied that it has not." More sins of construction have been committed under this specious reasoning than could be catalogued in a book. These Scotch verdicts are more common than direct decisions on the real validity of the laws. It is pleasant to turn from this picture of irrational dogmatism to the language of Mr. Justice Bradley, in *Boyd vs. U. S.*, 116 U. S., 635, where he says:

"Illegitimate and unconstitutional practices get their first

footing in that way, viz.: By silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions, for the security of person and property, should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of citizens against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

There is no place where hard cases make bad law more often than in the test of Legislative power, nor is there any place where the cool, better judgment of the judiciary is more often called upon to yield itself to the sway of considerations of expediency, masked behind an attempt at uphill reasoning, than cases involving the constitutionality of tax laws. No more striking illustration of the subject can be found than that construction placed by some courts upon constitutional rules of uniformity which permit the legislature to exercise the power of taxing some classes of property and not taxing others, and denies to it the right to tax different classes of property at different rates, though the difference is ever so slight. A variation of a thousandth part of a mill in the rate of taxing different classes of property once subject to taxation avoids the law, but a variation which goes to the full length and taxes one class of property at a double rate, and releases another altogether, is not open to the objection. Yet no court adopting this construction has paused to consider what ridiculously absurd motives such a construction imposes to the framers of a constitutional provision of this character in giving

the Legislature the power to pass an altogether vicious measure, and restraining it from implanting the same vice in the laws in a slight degree.

This is the inspiration from which the Court below drew its reasoning. This is the reasoning of the Supreme Court of Dakota Territory in *Ferris vs. Vannier*, 42 N. W. Rep. 31, under a similar Organic Act, where it was held that the prohibition against discrimination in taxing different kinds of property only extended to prevent taxing different kinds of property at different rates, and would not prevent the imposition of the entire burden on one class of property and exempting another.

While the objections we shall urge go largely to discriminations, after the Legislature has actually declared the property to be taxable, many of the cases announce principles which counsel asked to have applied as a rule for the guidance of the court in this case, draw their inspiration, primarily, from this fundamental error which permeates the whole, and their reasoning is traceable to it.

This is the first time this Court has been called upon unfettered by binding instructions of some Supreme Court of a State, to construe a clause of the character in question, and we submit that its guarantees are not to be submitted to the erosive process of a strict construction, but that its provisions should be construed liberally and and by the same canons of interpretation which this Court applies in all cases of constitutional authority, where it is not obliged to yield its assent to the final decision of the highest Court of some State.

In the case of *Francis vs. Railroad Co.*, 19 Kan. 303, the various constitutional provisions of the states on the subject of uniformity in taxation are collected and compared, and by a comparison of the Organic Act with the various provisions collected in that case, that act clearly falls within that class which contains directions to tax all property and prohibits the legislature from selecting any class to bear a given public burden as was done and upheld in *Commrs. vs. Nelson*, 19 Kan. 234, though practically overruled by the later case of *Marion, etc., Rld. Co. vs. Champlin*, 37 Kan. 682. This provision of the Organic Act of the Territory imports a different and wider prohibition than that contained in the fourteenth amendment to the Constitution prohibiting the deprivation of property without due process of law. If not, it is meaningless, because by Section 28 of the Organic Act the Constitution of the United States is expressly put in force in the Territory, and the tax clause contained in Section 6 need not have been enacted. We submit the three inhibitions of this Act, (1) against taxing the property of non-residents higher than that of residents; (2) making unequal discriminations in taxing different kinds of property; (3) requiring all property subject to taxation to be taxed in proportion to its value, are the constitutional restrictions on the power of the of the Territorial Legislative Assembly which nullify this law. Whatever may be the rule where discrepancies in valuation of the property of the taxpayer arise from accident or the varying judgment or partiality of those entrusted with its execution and the resultant burdens varying thereby; in short, from their disobedience of the law, we insist that when every official charged with the perform-

ance of a duty under the law executes that duty with strict impartiality and faithfulness to the requirements of the law, which necessarily results in inequality in the burdens imposed, that such inequality is the fault of the law and therefore within constitutional inhibition.

The plaintiffs are all non-residents of the Territory. It is admitted that the property was valued higher on account of the flight of time, the growth of the animals, the improvement in their condition and an increased market value, and that other property in the county proper and throughout the Territory of the same kind likewise enhanced in value within the same period. The complainants' property was assessed as of May 1st at its actual value. Other property of the same kind was assessed as of February 1st at its actual value on that date. If these causes had worked double the value of the property in the intervening period, the property assessed last would pay a double tax. It is said by the Court below that the legislature was familiar with the conditions existing in these reservations. It is too plainly manifest that they were entirely familiar with conditions and familiar with the fact that these reservations were occupied by drovers who lived beyond the jurisdiction of the Territory and shipped their cattle into these reservations for the purpose of pasturage. They knew by treating these reservations as a class they were also leveling a tax at the property of non-residents of the Territory, and the case is just as plain as though they had been expressly classed as non-residents in so many words in the Act itself. It is insisted, however, that extraordinary conditions

existed in these reservations authorizing the legislature to make two classes of cattle and call them different classes of property and to affix different methods for the valuation thereof, at a different time, by a different tribunal, with a different authority, for the correction of assessments.

If that be true, the treatment of this property as a separate class must cease at the point where substantial distinctions disappear, and if it be conceded that the date of the inventory of the property for taxation even may be varied, to meet the actual presence within the bounds of the reservation of the greatest number of cattle, there is no necessity for making the inventory and the valuation concurrent. The township assessor actually assesses the property in the organized counties at any time between February first and the first Monday of May (see pp. 5582 and 5624, Rev. Stat. Okla., 1893). During the month of April and a part of the month of May, therefore, the special assessor for the Indian reservations and the regular assessor in the organized counties are both engaged in the performance of their duty, the one assessing cattle at its value on May first and the other at its value on February first. Should property be brought into the organized part of the Territory after the first day of May and before the first day of September, the assessor assesses such property as of the first day of February for that year. It is therefore seen that the legislature do not regard the fact of assessment or the liability of property for taxation as at all necessarily concurrent with the time when the valuation is to be imposed; so that whatever excuse may be

offered for a law changing the time when the same class of property so situated shall become liable to taxation, or varying the time when the assessor shall in fact perform his duty, there is no exigency which requires a valuation to be affixed to the property at a different date in the one case from that resorted to in the other. An owner takes one herd to the reservation during the month of February; another herd to some organized part of the Territory in the month of January; another herd to some organized part of the Territory in the month of February; another herd to some organized part of the Territory during the month of March. Those herds located in the organized part of the Territory in January and March, may be valued by the assessor as late as the first Monday in May at the value they possessed on the first day of February. That herd located in the organized part of the Territory during the month of February is not valued at all for taxation, and that herd located in the Indian reservation may be valued on the first day of April, and its value affixed at what the assessor may believe it will be likely to be worth on the ensuing first day of May. The herd taken into the Territory proper during the month of March may be valued at ten dollars per head, because that was their value on the first day of February. The herd taken into the reservation may be valued at twenty dollars per head, its value on May first, resulting in a double tax, a condition not at all improbable or impossible to any commodity possessing a fluctuating value, as is true with respect to cattle. The object of this tax was to reach these migratory herds of cattle. If the legislature can exempt migratory property arriving in the Territory proper for

one month, may they not exempt it altogether? In short, what is to prevent them from taxing migratory property in one part of the Territory and exempting it in another? Again, if the legislature is warranted in affixing different times for the valuation of property for mere purpose of catching an increased inventory for the purpose of assessment, and thus varying the time of inventorying the same class of property in different parts of the Territory, why may they not equally consult every business exigency—tax the merchants of one part of the Territory at a time when, under known business usage they are stocked up in anticipation of a heavy trade? tax the railroads at that period of the year when they usually have the greatest equipment in service? tax the wheat of the farmer just after harvest and before he has had an opportunity to market it? or favor other lines of business in the same way by taxing it at a time when it is likely to impose the lightest burden? If the principle of this discrimination is to be admitted, there is no limit to the extent to which it could be pushed, and the constitutional requirement for uniformity could be nullified by these artful evasions. There is no difference between the fixing of different values to property and fixing different times for its valuation, which would produce the same result, because the fixing of values to property possessing a fluctuating value at different times fixes different values. The court below says the legislature passed this law in view of existing conditions in these reservations. The legislature undoubtedly understood that the drovers were removing large herds to these reservations in the spring of the year from the western arid plains for the purpose of putting them on the grass and

fattening them for the market; that they would arrive in an almost starving condition and that the pasturage would speedily fatten them. They knew it would be one thing to value these cattle as of the first of February and another thing altogether to value them as of the first day of May. The owners of this property were not the constituents of the body that enacted this law. The imposition of an undue burden and the relief of their constituents to that extent would be a matter of commendation rather than a matter of criticism, and it was simply a question of attempting to get the most they could out of these cattle for the benefit of the residents of the Territory.

Time is always of the essence of value, and is so recognized in every department of the law, whether it be for the valuation of personal property or real property, and in every instance when the value of property becomes a matter for judicial inquiry, it is limited to some particular time. That time has always been a matter of importance for the courts to determine. In judicial investigation of every question of value, values at a different time than that to which the investigation is limited are regarded as inadmissible without evidence of comparison between the value at the material date and the time to which the evidence is coupled. The tax laws of the Territory recognize this principle, that value is dependent on time by requiring real estate to be valued as of the first day of January, personal property generally as of the first day of February, and personal property in unorganized country as of the first day of May. In short, the legislation under consideration admits the

point that time is of the essence of value. Among the authorities we rely upon, is *Graham vs. The Board of Co. Comm'rs.*, 31 Kan., 473, where it is held that a law authorizing the imposition of a tax on cattle brought into the State after the first day of March, which made no provision for taxing other kinds of property brought into the State after that date, violated the rule of uniformity prescribed in the Constitution of the State and is void. The effect of this ruling is sought to be obviated by pointing to the Session Laws of 1895, p. 229, known as the transient property law, which, it is claimed, meets the objection to the constitutionality of the law as announced in *Graham vs. The Board of Co. Comm'rs.*, *supra*. This statute does not have this effect, for two reasons: If it is regarded as valid it does not meet the objection, because the cattle of the complainants are discriminated against by this law. It does not pretend to tax property brought into the Territory during the month of February. It requires a valuation of this property as of February first, and if the property is brought in by a person, firm or corporation acquiring a settlement in the Territory, it permits it to escape taxation by showing that it has been assessed for taxation in some other State or county of the Territory for the same year. The *Graham* case turns upon the important principle that if other property brought into the Territory after the ordinary date when property becomes liable for taxation, is not equally taxed the rule of uniformity is violated. The legislature for some reason has omitted property brought in during the month of February. If this transient property tax law is an answer to the objection in the *Graham* case, it would be equally

good to tax only transient property brought into the Territory on the fourth day of July. It is not a matter of degree, but a matter of principle. But there is no valid law which authorizes the taxation of transient property in the Territory. The discriminations found in this Act itself between resident and non-resident owners have the effect to nullify the law. The individual partnership or corporation which brings property into the Territory after the first day of March, incident to a settlement and domicile in the Territory, cannot be taxed if his property has been assessed elsewhere for taxation that year. A non-resident of the Territory who brings property in after the first day of March cannot escape taxation by making such showing. It is also worthy of remark in this connection that the petition alleges that the major part of the property of the plaintiffs had been assessed for the year 1895 in the states from whence the same was removed, and that the taxes so imposed were a personal charge against each of the plaintiffs and could be collected. They plead the very exception which is allowed in favor of the citizens of the Territory.

We therefore submit that the rule laid down in *Graham vs. Commissioners, supra*, is applicable to this case in every essential respect. If the assessment of transient property in the organized parts of the Territory under these restrictions is a commensurate imposition of taxes on transient property elsewhere to uphold the tax on this transient property in the reservations, what bounds can be set to the action of the legislature in that respect? As above suggested, they might confine it to a single day or to Sundays. The question is one upon which very little

direct authority can be cited. *Ferris vs. Vannier*, 42 N. W. Rep. 31, construing a similar Organic Act to authorize the Legislative Assembly of the Territory to select its subjects for taxation, in addition to being a manifestly unsound exposition of the meaning of the law in question; is, in effect, an overruled case.

*N. P. Rld. Co. vs. McGinnis*, (N. D.) 61 Pac. 1032.

*Rld. Co. vs. Walker*, 47 Fed. 681.

*In re Construction of Revenue Law*, (S. D.) 48 N. W. 813.

The Court below relied in its decision on this point exclusively on the case of *Nelson Lumber Co. vs. Lorain*, 22 Fed. 54. In that case the times of inventory of the property under consideration were variant but the time for valuation was concurrent, and Judge Bunn, in rendering that decision, emphasized the fact that no claim was made of any discrepancy in the valuation of the property. The decision largely proceeds upon this ground and is rather in favor of than against the proposition that varying dates for valuation produce variation in values. Had the legislation under consideration stopped at the point of varying dates for the inventory of property, as was the case in Wisconsin law, it would present altogether a different question. If it be said that it is difficult in April to value property as of the first day of February, it is a difficulty which the legislature have imposed in the case of all other property, because the assessor is vested with a discretion to commence his duties any time after the first day of February and to finish

before the first Monday in May. It certainly presents no more difficulty than that imposed by the legislature in this reservation tax law upon the assessor to commence the performance of his duties in April and to assess the property at its value at a future date.

Counsel also cite *People vs. Springvalley Hydraulic Gold Co.*, 92 N. Y. 383; *People vs. Commissioners*, 91 N. Y. 593; *State vs. Lindell Hotel Co.*, 9 Mo. App. 450; *Assn., etc., vs. Mayor, etc.*, 104 N. Y. 581. These cases are wholly inapplicable, as no question of legislative power to enact the laws under consideration was involved in either case and it was purely a matter of legislative construction.

The case of *Shotwell vs. Moore*, 129 U. S. 590, is also cited, wherein the language of this Court approved the method of ascertaining the property of merchants by monthly average for the preceding year. This same rule also received the approval of the Supreme Court of Ohio in *Shotwell vs. Moore*, 45 Ohio State, 623; but it argues nothing, because this method is nothing but an evidentiary proceeding to ascertain the true amount of the capital of the merchants invested in their business at the same date when other property is assessed, and neither this Court nor the Supreme Court of Ohio would look with that same degree of favor on a law which would studiously assess a merchant's stock at a time when they were known to be heavily stocked, according to custom of their business, at a different time from what other property is assessed. That is precisely the difference between those cases and the case at bar. The case of *Wis. Cent. Rld. Co. vs. Lincoln Co.*, 57 Wis. 137; 15 N. W. Rep. 121,

which held that a valuation of personal property as of May first and a valuation of real estate at any time between May first and the last Monday in June did not violate the provision for uniformity of taxation in the Wisconsin Constitution. This case rests directly on no authority, but is the outgrowth of a line of decisions in that State which upheld the principle that under the limitations of the Wisconsin Constitution the legislature may make substantial discriminations in taxing different kinds of property, but whether that ruling is sound or not no claim was made in that case that a disparity of values was produced by the varied dates for the valuation of property. At any rate, the Wisconsin decisions will afford but little aid to the settlement of this question because of the dissimilarity between the constitutional provision under consideration there and that under consideration here. Even if it were otherwise, authority for taxing different classes of property at a different time is not authority for an arbitrary subdivision of the same kind of property and fixing different times for the valuation thereof.

*Commissioners vs. Nelson*, 19 Kan. 234, is also relied upon by counsel for appellant. This case held that the legislature might impose a tax for some public purposes on the real estate in a municipality alone. The force of that authority, however, is weakened if not entirely destroyed by the case of *Marion, etc., Rld. Co. vs. Champlin*, 37 Kan. 682, in which it is held that a tax levied on property of the residents of a township for road purposes under legislative sanction is void for want of uniformity.

*In Knowlton vs. Board of Supervisors of Rock County*, 9 Wis. 378, Chief Justice Dixon uses the following language:

"It is believed that if the legislature can, by classification, thus arbitrarily and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the description, such as odd numbered lots and blocks and even numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use or description, or, as in the present case, by its *location*, and thus the *rules* of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the Constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature; 'you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property,

and legislate for one class and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn constitutional sanction to the system of taxation so manifestly and grossly unjust, that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

In *Inhabitants of Cheshire vs. County Commissioners*, 118 Mass. 386, Wells, J., in the opinion of the court, says:

"It appears to us that the practical operation of this statute, construed as we have found ourselves compelled to construe its terms, is directly and necessarily to produce disproportion to a greater or less extent, in the levy of all taxes based upon valuations which include such property as that to which it applies. That being its necessary tendency, it is immaterial whether the effect upon the general distribution of the tax be great or small, it is equally in violation of the Constitution, and therefore not within the legitimate authority of the legislature."

In addition to the authorities already cited and as having some bearing upon the principles involved in the case, we cite.

*Co. Commrs. vs. Wilson*, 15 Col. 90; 24 Pac. Rep. 563.

*Railroad Tax Cases*, 8 Sawyer 250.

*Cunningham vs. The Bank*, 101 U. S. 533.

*Rld. Tax Cas.*, 92 U. S. 575.

*Cooley on Taxation*, 218.

*State vs. O'Brian*, 89 Mo. 631.

*Ky. Rld Co. Tax Cas.*, 115 U. S. 321.

*Co. Commrs. vs. Dunn*, (Colo.) 40 Pac. 357.

*State vs. Dalrymple*, 49 N. J. L. 530.

*Cox vs. Truitt*, (N. J.) 31 Atl. 168.

*Welty on Assessments*, Sec. 185.

*Hale vs. City of Kenosha*, 29 Wis. 599.

*Primm vs. City of Bellville*, 59 Ill. 142.

*Bright vs. McCullough*, 27 Ind. 223.

*Field vs. Commissioners of Highland County*,  
36 Ohio State, 476.

We believe the relation between the taxpayers of a Territory, and especially between resident and non-resident tax-payers, is analogous with that subsisting between National Banks and other moneyed corporations in a state, and that rule stated in *Boyer vs. Boyer*, 113 U. S. 689, ought to be applied to discriminations pointed out in this case between the plaintiffs and the other taxpayers of the Territory. Mr. Justice Bradley, delivering the opinion of the Court in that case, says:

"The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule that it is not absolute equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or equality of taxation cannot in the nature of things be expected or attained under any system. But as substantial equality is attainable and is required by the supreme law of the land, in respect as state taxation of national bank shares when the inequality is so palpable as to show that the discrimination against capital invested in such shares, is serious, the courts have no discretion but to interfere."

The imposition of the rule of uniformity in the national banking law between national banks and other moneyed institutions in a state, is not more stringent than that imposed as between all taxpayers in the Organic Act of the Territory.

Counsel claim that the natural growth of the property in value has its compensating effect in the assessment of the property of other taxpayers in the Territory, because on the first day of February they are taxed upon the feed and forage which they subsequently feed to their cattle to produce the commensurate growth. Can the legislature tax the provender fed to these cattle in Texas or the grass in the Indian reservation. If they can it would still be no answer to the element of increase from changes in the market.

## VI.

**That the said Act of the legislature is void in that it is local and special legislation, and in violation of the provisions of Section 1, of the Act of Congress of July 30, 1886.**

That said Act of Congress, Vol. 24 U. S., Stat. at Large, 170, ch. 818, provides:

"That the Legislatures of the Territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases:

\* \* \* \* \*

"For the assessment and collection of taxes for Territorial, County, Township or road purposes."

\* \* \* \* \*

"In all other cases where a general law can be made applicable no special law shall be enacted in any of the

Territories of the United States by the Territorial Legislatures thereof."

Mr. Cooley in his work on Taxation, Second Edition, at page 325, says:

"The Legislative Act for the levy of a tax, as much as in any other case, must be passed under the restrictions of the Constitution, or it can have no validity. Therefore, when the Constitution requires an Act to have but one object, which shall be expressed in the title, the requirement must be complied with. And if local or special laws are forbidden by the Constitution, they will be void in tax cases."

A more satisfactory statement of the doctrine peculiarly applicable to this subject cannot be found than that given by Mr. Sutherland in his work on Statutory Construction, Secs. 127 and 128:

"A law may be general in its terms and apply to a class, constituted by having characteristics which make it a class, and yet be an illusory classification, which will not warrant legislation confined to it, where special or local legislation is prohibited. The grouping must be founded on peculiarities requiring legislation, and legislation, which, by reason of the absence of such peculiarities, is not necessary or applicable outside of that class. In other words, the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which will thus serve a basis for classification must be of such a nature as to mark the objects, so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the whole subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the

nature of things, as will, in some reasonable degree, at least account for and justify the restriction of the legislation. Distinctions which do not arise from substantial differences, so marked as to call for separate legislation constitute no ground for supporting such legislation as general."

This Court, in dealing with a kindred subject, where a basis of classification is required in applying the constitutional restriction on a denial of the equal protection of the law (*Rld. Co. vs. Ellis*, 165 U. S. 150) quotes with approval Mr. Justice Catron's declaration in *Van Zandt vs. Waddel*, 2 Yerger 260:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community who made the law by another."

And again, from *Dibrell vs. Morris' Heirs*, 15 S. W. 87:

"We conclude upon a review of the cases referred to above, that whether a statute be public or private, special or general, in form, if it attempts to create distinctions and classifications between the citizens of the state, the basis of such classification must be natural and not arbitrary."

And Mr. Justice Brewer, in the same case, speaking for the Court, says:

"But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposi-

tion this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily."

And also quotes the language of Black, J., in *State vs. Loomis*, 115 Mo. 307:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

And again, for the Court in the main case:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in each of these it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which supports a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Burgess, J., in *State vs. Granneman* (Mo.), 33 S. W. Rep. 785, speaking of a similar constitutional provision, says:

"It is to prohibit local and special legislation and to substitute general law in the place of it, *wherever by general laws the same ends could be accomplished.*"

Henshaw, J., in the opinion of the Court in *Ex Parte Jentsch*, (Cal.) 44 Pac. Rep. 803, says:

"A law is not always general because it operates upon all within a class. *There must be back of that a substantial reason why it is made to operate only upon a class and not generally upon all.*"

\* \* \* \* \*

"The classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation."

These expressions are in accord with all the authorities.

*State vs. Cooley*, (Minn.) 58 N. W. Rep. 150.

*Rutgers vs. City of New Brunswick*, 42 N. J. Law, 53.

*VanRiper vs. Parsons*, 40 N. J. Law, 1.

*Guthrie Daily Leader vs. Cameron*, (Okla.) 41 Pac. Rep. 635.

*Kimball vs. Rosendale*, 42 Wis. 407.

*In re application of Church*, 92 N. Y. 4.

We now invite the attention of the Court to the actual differences in the provisions of law affecting the citizens of the Territory generally as taxpayers, and those affecting the taxpayers in the unorganized districts and reservations.

*First.* The general statutes tax all property in the organized part of the Territory, and in the Indian reservations only one class of property.

"All property, whether real or personal, all moneys, notes or investments in bonds, or stock owned by joint stock companies, or otherwise, of persons residing in this Territory, the property of corporations now existing or hereafter created, and the property of all banks or banking companies now existing or hereafter created," etc., is the language of Paragraph 5577 of the Revised Statutes of the Territory, declaring what property shall be

subject to taxation within the proper limits of the Territory.

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory," etc., is the language of Section 1 of the Act in question, declaring what property shall be subject to taxation in any unorganized country.

The latter clause must be construed to embrace cattle and such other classes of personal property only as may be *ejusdem generis* therewith.

Sutherland on Statutory Construction, Secs. 268, 269, 270, 272, and 273.

The term "cattle" was probably used in its generic sense to include domestic animals generally.

*Decatur Bank vs. St. Louis Bank*, 21 Wall. 299.

The import of the law is simply nothing more nor less than to tax domestic animals in those reservations, and will not admit of a construction broad enough to reach all classes of personal property, such as merchandise choses in action, growing crops, household goods, farming implements; and other property of like character.

*Second.* Throughout the Territory generally property is assessed by the township trustees in the townships; (§ 6061, Okla. 1893); by city and township assessors in cities and towns. (§ 6062, Id). In cities and towns the assessors are elected annually, (§ 6062, Id.) and in townships are elected bi-ennially. (§ 6014, Id.)

Section one of the Act under consideration provides that the Board of County Commissioners shall appoint a

special assessor each year, who shall take the same oath and give the same bond as a township assessor.

City and township assessors are required to be residents and qualified voters in the township or city where elected. (§§ 6015, 547, Id.)

No such requirement is imposed on the special assessor.

*Third.* On the second Monday of January the several township and city assessors are required to meet at the county seat and agree upon an equal cash basis of valuation of all property that they may be called upon to assess.

In this matter the special assessors do not participate, nor are they affected by such proceedings. (Par 6068 Id.)

*Fourth.* The township assessor, township clerk and township treasurer are a township board of equalization. The Mayor, City Clerk and City Assessor are a City Board of Equalization and meet on the third Monday of April and hear all grievances, and their decision is final with regard to all individual assessments. (Par. 5620, Id.)

In the unorganized country complaints of individuals are preferred to the Board of County Commissioners on the first Monday in June, who are given like power in these special cases as given to the Board of Equalization in a township.

S. L. Okla. 1895, page 233.

On the first Monday of June the Board of County Commissioners hold a session for the purpose of equalizing the assessment roll between the different townships in their county. (Par. 5621, Id.)

This section embraces no authority for the relief of the taxpayers in the unorganized country as a class.

*Fifth.* In the organized parts of the Territory the Attorney-General is required to prepare forms of notices for the assessor and lists of property for the taxpayer. These are required to be furnished to the township and city Assessors by the County Clerk, and such township and city Assessors are required to make their assessments by demanding from each person, firm and corporation liable to assessment or their agents, officers or trustees in charge thereof, the execution of one these lists, under oath, and if they neglect or refuse, the assessor shall estimate value of their property from the best information he can obtain. In the event of the owner being absent or unknown, the assessor may ascertain and estimate the value thereof, and many special forms and proceedings are provided for ascertaining the property of banks and corporations. In case the Assessor raises the valuation placed in any list by a taxpayer, he is required to deliver to such taxpayer a copy of the schedule showing the increase. (Par. 5580 to 5601, inclusive, Id.)

None of these requirements are imposed on the special assessor in the unorganized country. (P. 233, S. L. Okla. 1895.) He is given a *carte blanche* to make out his assessment rolls and lists "from the best evidence attainable," and the restrictions for the safety of the taxpayers imposed on the township and city assessors are obliterated in this special enactment.

*Sixth.* Property in the Territory is assessed and inventoried as of the first day of February. Property in the unorganized country on the same date is assessed and

inventoried as of the first day of May, and property removed from the unorganized country during the intervening period is not assessed at all.

*Seventh.* Property brought into the unorganized country during this intervening period becomes liable for taxation for that year; property removed into the organized counties of the Territory becomes liable for taxation for that year in no event except when it acquires its situs during two out of the three intervening months, and then only under the restrictions that if the property belongs to residents and has been assessed elsewhere, either in or out of the Territory, it can not be valued. The first of March being a later date than that imposed for taxation in any of the surrounding states or territories, the effect of this discrimination is to practically exonerate residents of the Territory from the payment of taxes on property acquiring a situs after the first of March.

*Eighth.* The special law provides discrepant periods for the valuation of the same kind of property.

We now invite the attention of the Court to the actual difference in conditions which exist between this unorganized country and the organized counties of the Territory. The unorganized parts of the Territory consist of the Kaw Indian reservation, Osage Indian reservation, Ponca Indian reservation, Otoe and Missouri Indian reservation, and the Wichita, Kiowa, Comanche and Apache Indian reservations. As the property affected by this tax is principally located in the Osage Indian reservation, we shall confine our description to such

matters concerning which this Court will take judicial notice, with reference to that Indian reservation.

The policy of the tribal government and of the Interior Department in the management of the affairs of these Indians have permitted white people to go among them and live as laborers, farmers, artisans, and tenants and squatters, until the actual population of the country is made up of a much greater number of whites than Indians.

The policy of the Act of Congress permitting the tribe, under the sanction of the agent, and Secretary of the Interior, to lease their lands, not needed for farming or allotment, for grazing and mining purposes, has induced the development of a large number of large cattle ranches, in addition to which there are on the Indian reservation a great number of licensed Indian traders, and several small towns.

Many of the Indian citizens, and especially the mixed bloods, have selected large tracts from the best lands, and cultivate the same on an extensive scale. This process has now advanced to such a degree and the white population became so great that Congress, at the last session saw fit to direct the holding of terms of the District Court of the Territory, annually, at Pawhuska, in this reservation. Also bridges leading to this country, 29 St., 531.

The cattle ranch business is conducted on two systems, feeding them in winter and grazing them in summer.

The farming industry, on account of the remoteness of the country from markets, necessarily results in cheap grain, and there is every inducement for feeders to drive

their cattle to these ranches in the winter for the purpose of fattening them in that way on cheap grain.

There is no geographical or physical difference between any part of these Indian reservations and the Territory proper. They are simply a continuation of the same hills, valleys, prairies, and forests. The seasons change at the same time; the organized country and the unorganized country are both inhabited, the soil is generally utilized for the purpose of agriculture and grazing, and the only possible distinction that can be pointed out is the fact that over one extends a municipal government, and over the other there is none.

We have already seen that one of the most valued tests of what is a general or a special law is: Can the same legitimate end be attained by a law which will reach all subjects within its provision, or is there something which cannot be said with regard to all and must necessarily be applied to a few?

With respect to the fact merely of constituting a special tribunal for the purpose of making these assessments, we concede there exists a difference which draws its source from a substantial ground for classification, in the fact that the unorganized Territory is without the machinery provided by the law for the election of assessors as in ordinary cases.

We concede it to be within the power of the legislature, if the property in these Indian reservations is taxable at all, to make a provision for the selection of a special tribunal to make these assessments, but we do not concede it to be within the power of the legislature to authorize the selection of an individual from outside of

the body of the people to be affected thereby, in the one case allowing the people to be assessed by a person who owes his official position to their suffrages, and in the other by a person who is an alien to them, possesses nothing in common with them and is likely to go among them with decidedly antagonistic feelings. In conceding the right to constitute a special tribunal for this assessment, we do not concede that the necessity for constituting such a tribunal creates the necessity of selecting such a tribunal outside of the body of the people among whom he shall perform his duties.

The legislature have seen fit to favor all the organized portions of the Territory with an assessor who is the near neighbor of every man to be assessed. The selection of an assessor residing within the organized county, as has been the universal practice, and sending him across the border to make these assessments, with the sanction of the law, ought alone to be sufficient to condemn the law.

We do not feel the necessity, however, of predicating an argument on this proposition, and, for the purpose of this argument, shall assume that this special assessor was properly and legally constituted in all respects.

The fact of the appointment of a special assessor reduced all difference.

It is from this point forward that all material distinctions cease between this unorganized country and any other part of the Territory. Beyond this point every attempt at classification for diversity of regulation is illusory. After the appointment of this assessor, if there is any right at all to tax, the unorganized country

for which the assessor is appointed stands on an equal footing with, and is to all intents and purposes, merely a township of the county for the purpose of assessment—is merely a part of the same taxing district.

The case from this point forward presents every aggravated feature that could be presented by requiring the assessor in Newkirk township, in Kay County, to assess property as of the first day of February, and the assessor in Kildare township, in the same County, to assess it as of the first day of May.

But it is said that the known business usage of driving in these large herds of cattle in the spring of the year, after the first of February, warranted the legislature in postponing the date of valuation in the reservations to a later date. But this presents nothing more than is likely to, and which the legislature recognizes, by the transient tax law does occur in the organized counties. If a general law can attain the legitimate end sought by the legislature, a partial law is then a local and a special law, and hence within the constitutional prohibition.

Suppose the Legislature of the Territory had enacted that a special assessor should be appointed for the unorganized attached territory, by the Board of County Commissioners, and who should perform his duties in the same manner as the other assessors of the Territory; then suppose that it had passed a law subjecting to taxation all property which finds its way into the Territory, either organized or unorganized, after the first day of February and before the first day of September, would it not have met what the Court below suggested was the extraordinary conditions obtaining in this

unorganized territory, and entirely dispensed with any necessity for special provisions affecting taxation of property in the unorganized territory.

The basis of classification is imaginary, because the only difference between the unorganized territory and the organized territory, after the first day of February, is that there may possibly be more transient property finding its way into the unorganized territory than does into the organized parts of the territory.

If that kind of a classification is warranted the same rule might be adopted throughout the organized parts of the territory, because in the western counties in the Territory, whose business is chiefly grazing, the same conditions obtain, and, throughout the western half of the Territory there are more cattle brought into the Territory during the period between February first and May first, than are ordinarily kept in such counties throughout the year, and certainly more of the same kind of property in one locality than exists in another will not warrant any chimerical division of such property, due to no other relation than quantity.

It is, therefore, quite clear from the nature of the subject-matter that a general law which should be in force in every part of the Territory, would have met what the Court below was pleased to denominate "extraordinary conditions existing in these Indian reservations," and at the same time would have fairly met in an equal manner those same conditions which exist throughout all parts of the Territory.

There are, in the Indian reservations: *First*, property which was in the reservation on the first day of February,

and, *second*, property which came afterwards. This same division would apply throughout any of the organized counties of the Territory in the same way. There can be no possible reason suggested why property in the unorganized territory at the date other property is assessed should not be assessed the same way, and that property coming in after that date should not be assessed in the same manner and by the same law that transient property is assessed in the organized counties.

A law which puts two herds of cattle belonging to the same owner, brought into the unorganized and organized parts of the Territory at the same time, for the same purpose, into a separate classification for taxation, may justly be characterized in the language of the Pennsylvania Supreme Court, in *Commonwealth vs. Patten*, 88 Pa. St. 258, as "classification run mad."

The case of *Van Loon vs. Engle*, (Pa.) 33 Atl. Rep. 77, is directly in point on this question, where it is held that the ordinary classification of cities might afford a basis for variations in the manner of collecting city taxes, but affords no basis for variations in the methods of collecting state, county, school and poor taxes.

This attempt at classification is based on nothing but a mere business exigency which permeates the entire Territory.

It is said that the condition existing in these reservations are extraordinary on account of bringing cattle in during the grazing season. That is not true. Precisely similar conditions obtain in all of the west half of the Territory, which is practically devoted to grazing. The legislature have recognized that fact by

passing a free range law for the west half of the Territory, and by providing for leasing the public lands in the western portion of the Territory in large tracts, and in the eastern portion of the Territory in small tracts. (S. L. 1897, p. 41, Council Joint Res. 16, L. 1895, p. 273).

The spring grazing industry is just as great in the organized parts of the Territory as it is in the unorganized, a matter of which this court will take judicial notice from the course of the legislation of the Territory, and from its notorious character as a matter of public knowledge.

The law is precisely like one in principle, which singles out barbers and prohibits them from exercising their calling on Sunday, which is condemned as local, special and unconstitutional in *Eden vs. People*, 161 Ill. 296.

*State vs. Granneman*, (Mo.) 33 S. W. Rep. 984.

*Ex Parte Jentzsch*, (Cal.) 44 Pac. Rep. 803.

A constitutional enactment prohibiting the enactment of special laws for the assessment or collection of taxes extends to all proceedings requisite to raise money by taxation, and not merely to "assessment and collection" of such proceedings.

*Chicago, etc. Railroad Company vs. Forest* (Wis.), 70 N. W., Rep., 77.

A constitutional provision containing an enumerated list in which the legislature may not pass special or local laws, and a general clause prohibiting special legislation, when a general law can be made applicable, is an abso-

lute prohibition in the cases enumerated, and a qualified prohibition in those not.

*Gentile vs. State*, 29 Ind., 409.

*State vs. Colson*, (Ind.), 29 N. E. Rep., 595.

*State vs. City of Des Moines*, (Ia.), 65 N. W. Rep., 818.

The law in question is more arbitrary and illusory in its attempt at classification than either or any of the following cases, where the classification has been condemned and the law held inoperative under similar constitutional provisions.

An Act authorizing boroughs at seaside resorts to levy greater taxes for municipal revenues than may be levied by inland boroughs. *State vs. Philbrick*, (N. J.) 15 Atl. Rep. 577.

An Act relating to police, excluding from its operation sea-side towns. *Clark vs. Cape May*, (N. J.) 14 Atl. Rep. 591.

An act authorizing the formation of borough governments at sea-side resorts. *State vs. Somers Point*, 18 Atl. Rep. 694.

An Act making provision for the refunding of taxes in counties containing a city of the first class. *County Commrs. vs. Rosche*, (Ohio) 33 N. E. Rep. 408.

An Act making poor tax a lien on real estate except in cities of the second and fourth class. *Smith vs. Meadowbrook Brewing Co.*, 3 Lack & Jur. 145.

An Act providing that assessments against real estate in cities of the second class should be a lien against the real owner, whether named or not, and that a sale under such proceedings should vest a good title. *Safe Deposit*

*Trust Co. vs. Frick*, 152 Pa. St. 231; *McKay vs. Traynor*, 152 Pa. St. 242; 25 Atl. Rep. 530.

Or that provides that taxes shall be a lien throughout the State except in cities of a certain class. *Van Loon vs. Engle*, (Pa.), 33 Atl. Rep., 77.

A law which permits license taxes collected under county authority within cities to be turned into the city treasury for the use of the streets, and requires such licenses so collected outside of such cities to be turned into the county treasury. *San Luis Obispo vs. Graves*, 84 Cal., 71; 23 Pac. Rep., 1032.

A law making separate regulations in those boroughs where the governing power of the boroughs issues license to sell intoxicating liquors from those obtaining in boroughs where the power to issue licenses is possessed by Courts. *State vs. Hover*, (N. J.), 33 Atl. Rep., 217.

*Loucks vs. Bradshaw*, (N. J.), 27 Atl. Rep., 935.

A law which authorizes an amount to be charged by a municipality for issuing a dram-shop license, above the amount fixed by law, and authorizes such an increase in the amount to be imposed on a petition of one-fifth of the voters, and an election called in pursuance thereof. *State vs. Cramer*, (N. J.), 33 Atl. Rep., 201.

An Act making water rents a lien in cities of the second class. *Pittsburgh vs. Hughes*, 13 Pa. Co. Ct. R. 535,

An Act authorizing taxpayers of townships to make private contracts for the construction of their own roads and exempting them from the payment of road taxes. *In re Lehigh Valley Coal Co.*, 7 Kulp 271.

An Act prohibiting the location of a cemetery within a mile from a city of the first class, whose drainage empties into a stream. *City of Philadelphia vs. Westminster Cemetery Co.*, 162 Pa. St. 105.

A division of townships into two classes, those governed by special character and those governed by general law, and separate regulations affecting each. *State vs. Dorland*, (N. J.) 28 Atl. Rep. 599.

An Act making separate regulations as to city physicians in all cities where such regulations are not covered by previous law. *State vs. City of Orange*. (N. J.) 25 Atl. Rep. 268.

An Act consolidating the offices of city assessor, tax collector, street commissioner and chief of police, into a single office in cities which polled less than 600 votes at the election of 1890, when there was but one such city. *Brown vs the City of Tombstone*, (Ariz). 33 Pac. Rep. 587.

An Act conferring on County Attorneys in counties of a certain class the right at their option to appoint a deputy. *Welsh vs. Bromlett*, (Cal.) 33 Pac. Rep. 66.

An Act authorizing the designation of a paper published in the German language for a definite period before the passage of the law, which in effect prevents the future designation of such a paper published for the requisite period after the passage of the law. *State vs. Inhabitants of Trenton*, 24 Atl. Rep. 478.

Act to authorize companies to maintain and operate systems of sewerage in all cities, towns and boroughs, but which, in addition to requiring the consent of the

city authorities in all cases, requires a petition of property owners in one class of cities only *State vs. City of Plainfield*, (N. J.) 24 Atl. 494.

An Act defining the duties of recorders for cities having a certain number of inhabitants, which exempts from its operation cities not accepting its provisions by ordinance. Appeal of *City of Scranton School District*, 113 Pa. St. 176; *Commonwealth vs. Danworth*, 145, Pa. St. 172.

A law which authorizes cities to exercise the right of eminent domain, but which requires cities of a certain class, before resorting to its exercise, to attempt an agreement with the owner. *City of Pasadena vs. Stimpson*, 91 Cal. 238; 27 Pac. 604.

Separate provisions for the removal of county seats in counties possessing court houses worth thirty-five thousand dollars, and those which do not. *Edmonds vs. Herbrandson*, (N. D.) 50 N. W. Rep. 970.

An Act authorizing the relocation of a county seat in counties containing an area of forty-eight congressional townships, in which the county seat had theretofore been located, under a certain statute by a vote less than a majority of all the votes cast at such election. *Adams vs. Smith*, 6 Dak. 94; 50 N. W. Rep. 720.

An Act which provides that county warrants, in all counties but one shall bear interest. *Hotchkiss vs. Marion*, (Mont.) 29 Pac. 821.

A law which charges state indebtedness incurred in building roads through any county in the State as a liability against the county where such road is constructed. *Board vs. Buck*, 51 N. J. L. 155.

A law providing that special terms of court should be held in any county where there is an incorporated city of more than eight thousand inhabitants, more than twenty-seven miles from the county seat. *Commonwealth vs. Patton*, 88 Pa. St. 258; approved in *Scowles' Appeal*, 96 Pa. St. 429; *Morrison vs. Bachert*, 112 Pa. St. 322.

A mode of exercising the right of eminent domain by all cities of a single class, and peculiar to cities of such class. Appeal of Wilbert, 137 Pa. St., 494; *in re City of Pittsburgh*, 138 Pa. St., 401.

An act authorizing a city to appoint additional policemen. *Farrel vs. Board of Trustees*, 85 Cal., 408.

A law incorporating some municipalities into a port, and authorizing them to deepen and maintain the channel of a river. *Cook vs. Port of Portland*, (Or.), 27 Pac. Rep., 263.

An Act providing that in every city having more than two assembly districts, the boundraies of the wards of such cities should correspond therewith, and there being but one such city. *State vs. Newark*, 20 Atl. Rep., 886.

An Act authorizing cities of a certain class to fix the term, rate of compensation, and method of appointment of a city physician. *State vs. Simon*, (N. J.), 22 Atl. Rep., 120.

A law which prohibits the sale of merchandise to employes at a higher rate than others are charged for the same articles. *State vs. Coal Co.*, 33 W. Va., 188; 10 S. E. Rep., 288.

A law which authorizes railroad companies owning their own wharves to maintain ferries. *Thomas vs. Wash Rld. Co.*, 40 Fed. Rep. 126.

A statute exempting Building and Loan Associations from the operation of the usury laws. *Simpson vs. Building and Loan Assn.* (Ky.) 41 S. W. Rep. 570.

A statute authorizing a special form of complaint against railroads, in the collection of taxes. *People vs. Cent. Pac. Rld. Co.* 83 Cal. 593.

An Act authorizing townships not containing any village to macadamize its roads. *State vs. Township*, (N. J.) 14 Atl. 587.

A law which confers on all cities of a certain class power to improve its streets and assess the cost of the property benefited, but requires the adoption of its provisions by ordinance before becoming operative in such cities. *City of Reading vs. Savage*, 120 Pa. St. 198.

A law requiring a board of road viewers in cities of a certain class to have one lawyer among its members, who shall act thereon in a judicial capacity. *In re Ruan Street*, 132 Pa. St., 257.

In few, if any of the foregoing cases, was the attempted classification as illusory as the classification attempted in this case.

If this law had stopped with the creation of a special assesor and had remitted him to the performnnee of his duties under the general law, and if the transmutations of the taxable property of the Territory were such as to call for separate provisions for property acquiring a situs after the ordinary date of assessment had passed, had charged all the assessors in the Territory with the same duties with respect to the assessment of such property, taxed it all, and taxed it all alike, it would be open to no other question than whether the property located

in these reservations is taxable; but when the law goes beyond that point—limits regular assessors to a common schedule of values, the quotient of their common judgment, and requires the special assessor to act independently of that standard, imposes safeguards against oppression on the regular assessors by making their assessment a personal transaction with each individual taxpayer, and giving such taxpayer the primary right to make a list and valuation of his own property, unimpeachable, without notice, and obliterates these safeguards as against such special assessor, taxes the property under the hand of such special assessor at a later date and at a higher valuation, exempting all a part of the time and a favored part all of the time of the property which finds a situs in the organized portion of the Territory during the intervening period. Granting the right to the taxpayers of each regular assessment district to complain as a class before a board of equalization, and bring their rate of valuation into harmony with that imposed in the other assessment districts and denying this right to the taxpayers assessed by such special assessor, who need it most, the special assessor being a stranger to the adoption of the common standard and the persons assessed, nor of their selection, and gives to such taxpayers the right to complain only as individuals to a different tribunal, is manifestly a law conceived in a spirit of unfairness, enacted with the purpose of making an unfavored class to be governed by one rule and the mass of the community, who made the law, by another.

## VII.

**That the thirty-five per cent. added to the assessed value of the property by order of the Territorial Board of Equalization is unauthorized and void.**

The petition in the case alleges that the action of the Territorial Board of Equalization in raising the valuation of the property of these plaintiffs, and the action of the county clerk in extending the same, and such raised valuation on the tax books of said county against these plaintiffs is null and void in this, to-wit (see record, p. 13):

*First.* That said Board has no power or jurisdiction to alter the assessment of property made or attempted to be made in such unorganized territory and reservations attached to the counties of the Territory of Oklahoma for judicial purposes.

*Second.* Because the attempted raise so made by said Territorial Board of Equalization, was not an equalization, but was an attempt upon the part of said Territorial Board of Equalization to make an assessment which they thought would conform nearer to the value of the property in said Territory than that made by the local assessor; that the Territorial Board of Equalization raised the aggregate valuation of all of the counties in said Territory, except the County of Kingfisher, which they permitted to remain in the aggregate as returned to said Board by the County Clerk of said county, and adopted the rate of valuation in Kingfisher County as their standard of valuation of all of the counties of the Territory and raised the aggregate valuation of the other

counties from five to seventy-five per cent. to bring the valuation up to what they considered to be the standard adopted in said Kingfisher County, and which action on the part of said Territorial Board of Equalization the said plaintiffs allege to be wholly unauthorized and void.

We contend that the action of the Territorial Board of Equalization, in raising the valuation of the property of these plaintiffs thirty-five per cent., was an attempt on the part of the Territorial board to make a new assessment, and that if these plaintiffs are liable for taxation at all they are only liable upon the valuations as returned by the special assessor appointed under said Act. Mr. Justice Tarsney, in the opinion (record, p. 43) disposes of this question as follows:

"The final proposition contained in plaintiff's brief, that relating to the action of the Territorial Board of Equalization in raising the aggregate valuations of property returned from the County of Kay for the year 1895, have been fully considered and determined by this Court at this term in the case of *Wallace vs. Bullen*, held adversely to the contention of the plaintiffs herein, fully disposes of this point."

The case of *Wallace vs. Bullen*, referred to by Justice Tarsney, has never been published, but for the information of the Court we have procured and file herewith the opinion in manuscript. The case is still pending on motion for rehearing. It has, however, practically been overruled by the Supreme Court of the Territory by a decision rendered September 3, 1897, in the case of *Gray vs. Stiles*, 49 Pac. Rep. 1083, being pamphlet number 14, published September 30, 1897, in which case Justice McAtee, Justice Keaton and Justice Bierer each

write an opinion. We are content to permit this phase of the case to rest upon the opinion of the Court in the case of *Gray vs. Stiles* and the authorities cited. If the other points urged in this brief are well taken, it may not be necessary to pass upon this question to determine the case. If, however, the Court would consider and decide this proposition, it would decide a question of great importance to the Territory and would settle a question grievously affecting the finances of the Territory and the validity of municipal obligations in the Territory under constitutional limitations, and we apprehend that all of the parties to this controversy will unite in asking the Court to decide this question.

The rule so often announced in this Court as a principle of equitable relief, that the Court will not entertain a bill to enjoin the collection of taxes, unless those found to be due shall be tendered and paid before the commencement of the proceeding, can have no application to the partial relief demanded under this assignment of error in this brief, because by the agreement of the parties entered into in open court, in the trial Court, the relief should be granted in whole or in part as the facts warrant, and because, under Paragraph 5571 of the Revised Statutes of the Territory, where the taxes are all in dispute, the payment of those found to be due, or even admitted to be due, is a condition of the decree and not required to be paid or tendered before suit brought.

### CONCLUSION.

We think the several points raised in this brief urged against the validity of these taxes are sufficient to show that the Legislature in the first place has no authority to

enact legislation and make the same applicable to these Indian reservations, and that if such power were full and complete, the legislation complained of is clearly in violation of the Organic Act of the Territory; in violation of the Acts of Congress applicable to the Territory, an improper delegation of legislative powers to the Supreme Court of the Territory; for all of which reasons we contend that the Act is void, and we respectfully submit that all of the taxes complained of should be declared illegal and void.

HENRY E. ASP and  
JOHN W. SHARTEL,  
*Attorneys for Cross-Appellants.*

## APPENDIX.

### Statutes of the Territory Cited in the Foregoing Brief.

#### ARTICLE 6.—PROPERTY TAXABLE IN TERRITORY ATTACHED FOR JUDICIAL PURPOSES.

AN ACT to Amend Section 13, Article 2, of Chapter 70, of Oklahoma Statutes Relating to Revenue.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. That section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, be and the same is hereby amended so as to read as follows. Section 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached, shall appoint a special assessor each year, whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath as required of such township assessor, and receive the same fees as a township assessor, and the officer whose duty it shall be to collect the taxes in the organized county to which such country, district or reservation is attached shall collect the taxes and is vested with all the powers which he may exercise in the organized county, and his official bond shall cover such taxes

The assessor herein provided for shall begin and perform his duties between the first day of April and the twenty-fifth day of May in each year, and complete his duties and return his tax lists on or before June 1st, and said property herein authorized to be assessed shall be valued as of May 1st in each year. That in case said property at any time has by oversight or negligence or for any other cause, been irregularly, illegally, or defectively assessed, it shall be lawful for the special assessor to assess or reassess the same, as the case may be, and when done the same shall be valid for all intents and purposes, and in performing his duties under this section, he may make out his assessment rolls or lists from the best evidence attainable. Any person who feels aggrieved by his assessment in any such country, district or reservation, may appear before the board of county commissioners for the organized county to which such country, district or reservation is attached for judicial purposes, at their session commencing on the first Monday in June, and the board of county commissioners shall have power to correct any and all errors and equalize individual assessments: *Provided*, That the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to which it is attached, or in estimating or limiting the same.

SECTION 2. This act shall take effect and be in force from and after its passage and approval.

Approved March 5, 1895.

#### ARTICLE 5—TAXATION OF TRANSIENT PROPERTY.

AN ACT providing for the Assessment and Taxation of Property in Certain Cases.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. When any personal property shall be located in any county of this Territory after the first day

of March of any year, which shall acquire an actual situs therein, before the first day of September, such property is taxable therein for that year and shall be assessed and placed on the tax roll, and the tax collected as provided by this act.

SECTION 2. Whenever any live stock shall be located in this Territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this act.

SECTION 3. When any person, association or corporation shall settle or organize in any county in this Territory, and bring personal property therein after the first day of March and prior to the first day of September, in any year, it shall be the duty of the assessors to list and return such property for taxation that year, unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation on that year in some other state, or county in this Territory. If such property is brought within any county after the assessor has made his returns for that year to the county clerk the assessor shall at once assess such property and return the same to the county clerk, if the tax rolls be still in his hands, and after that to the county treasurer, and the same shall be entered on the tax books and collected as in other cases. If there be no assessor, then any township trustee or member of any city or town council where the property is located may make and return the assessments with like force and effect as though made by the assessor. The persons so assessed shall have the right, if assessed after the third Monday in April, to appear before the township or city board of equalization at any time before the taxes become due, and his taxes shall be equalized as provided by law in section 5620 of the statutes of 1893.

SECTION 4. If any person in this Territory, after his personal property is assessed and before the tax thereon

is paid, shall sell all the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall be a lien thereon, or if such property is about to be sold at auction, or sold at cost, then in either of such events the tax thereon shall at once become due payable, and the county treasurer shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereon, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any tax he owes thereon, but the property so purchased shall be liable in the hands of the purchasers for such tax: *Provided, however*, if the property be sold in the ordinary course of retail trade, it shall not be so liable in the hands of the purchasers.

SECTION 5. If the property of any taxpayer be so seized by attachment as to take all property liable to execution, without leaving a sufficient amount of property exempt from levy and sale to pay taxes, then the tax on the property of such taxpayer shall at once fall due and be paid from the proceeds of the sale of attached property in preference to all other claims against it.

SECTION 6. When any person is about to remove his property from the county after the same has been assessed and before the taxes thereon have been paid without leaving sufficient remaining for the payment of the taxes thereon, the tax shall at once become due and payable, and the treasurer shall issue a tax warrant for the collection of the same, and it shall be enforced as in other cases.

SECTION 7. \* \* \*

SECTION 8. If property subject to taxation be sold, seized, or attempted to be removed, as in this Act provided, before the assessor has made his return, or before the county clerk has turned over the tax-rolls for that year to the county treasurer, then, if the assessor's books be in his hands, he shall furnish to the county treasurer

the assessment of that person; but if the party has been assessed and the assessor's books be in the hands of the county clerk, then the county clerk shall furnish to the county treasurer the assessment of that person, and the county treasurer shall at once levy on the property so returned to him the percentage of tax levied in that county for the previous year, and collect the same as in this act provided. If the tax books for that year have come into the possession of the county treasurer, then, if such property be not listed therein, the county treasurer shall enter the same on the tax books and levy thereon the same percentage of tax that is levied in that county for that year, and the treasurer shall then collect the taxes so levied as in other cases.

SECTION 9. This act shall be in force and effect after the date of its passage and approval.

Approved March 8, 1895.

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COUNCIL JOINT RESOLUTION No. 16.

*Be it Resolved by the Legislative Assembly of the Territory of Oklahoma:*

That in case the Legislative Assembly fails to enact legislation governing the leasing of lands subject to lease in this Territory, the present board having control of leasing of public lands be, and are hereby, authorized to continue the leasing of such public lands: *Provided, also,* They are authorized to lease lands lying west of range 14, in such quantities as in their judgment may be most advantageous to the public interest.

Approved March 8, 1895.

## CHAPTER II.

## HERD LAW PROVISIONS.

AN ACT to Amend Section 31, of Article 2, of Chapter 2, of the Statutes of Oklahoma, 1893, entitled: "An Act to Regulate and Restrain the Running at Large of Domestic Animals and to provide for Fencing Against Them."

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. That section 31, of article 2, of chapter 2, of the Statutes of Oklahoma, of 1883, be amended to read as follows: Section 31. It is hereby declared that the provisions of this Act in regard to restraining stock shall not apply to all that part of Oklahoma lying west of a line beginning at a point on the south line of Washita County, where the east line of range seventeen (17) intersects the aforesaid south line; thence north, along said east line to township twenty-one (21), of Woods County; thence east, to the east line of range fifteen (15) west; thence north, along said line to the Cimarron river; thence following the meanderings of said Cimarron river to the east line of range seventeen (17) west; thence north, to township 26 north; thence east, to range 14; thence north to the Kansas line; and the same is hereby declared a free range country: *Provided, however*, That the people of such country may, by petitions hereinbefore provided for, have the privilege of voting on the restraining of stock, and the result of said vote remain in force and effect for a period of five years: *Provided, further*, That any person or persons occupying or using any school, college, or public building or indemnity lands in this Territory, not having leased the same, shall be guilty of a misdemeanor, and, on conviction, be fined not less than fifty dollars, nor more than one hundred dollars for each and every offense.

SECTION 2. This Act shall be in force and effect in each congressional township west of the line fixed by

this Act only at such times as all and the whole of the public school, college, public building, and indemnity lands of any such township are held under lease as provided by law.

SECTION 3. All acts and and parts of acts in conflict with this Act, are hereby repealed, in so far as they conflict with this act.

SECTION 4. This act shall be in force from and after the adjournment of the present session of this Legislative Assembly.

Approved March 9, 1897.

## CHAPTER LXX.

### REVENUE.

AN ACT to Provide for the Raising and Collecting of Revenue, and Repealing Chapter 75, of the Statutes of Oklahoma, entitled: "Revenue."

#### ARTICLE I—PROPERTY SUBJECT TO TAXATION.

*Be it Enacted by the Legislative Assembly of the Territory of Oklahoma:*

(5577) SECTION 1. All property, whether real or personal, all moneys, notes, credits, or investments in bonds, or stocks owned by joint stock companies or otherwise, of persons residing in this Territory, the property of corporations now existing, or hereafter created, and the property of all banks or banking companies now existing or hereafter created, and of all bankers, shall be subject to taxation, and such property, moneys, credits, investments, in bonds, stocks, joint stock companies or otherwise, or of the value thereof, shall be entered on the list of taxable property for that purpose in the manner prescribed by this act.

(5578) SECTION 2. The following classes of property shall be exempt from taxation, and may be omitted from the list herein required to be given:

First. The property of the United States and of this Territory, including school lands.

Second. The property of a county, incorporated city or village, or school district, when devoted to public use and not held or used for pecuniary profit.

Third. Public grounds, by whomsoever devoted to the public use and including all places set apart for the burial of the dead, except such as are held by any person, company or corporation with a view to profit or for the purpose of speculation in the sale thereof.

Fourth. The engine and implements used for extinguishing of fires with the grounds used exclusively for their buildings and for the the meetings of fire companies.

Fifth. The grounds and buildings of library, scientific, educational, benevolent and religious institutions, colleges or societies, devoted solely to the appropriate objects of these institutions, not exceeding ten acres in extent, and not leased or otherwise used with a view to pecuniary profit.

Sixth. The books, papers, furniture, scientific or other apparatus pertaining to the above institutions and used solely for the purpose above contemplated, and the like property of students in any such institutions used for the purpose of their education.

Seventh. All breaking, wells or fertilizing upon lands upon which final proof has not been made.

Eighth. Family portraits.

Ninth. All food and fuel provided in kind for the use of the family not to exceed provisions for one year's time: *Provided*, That no person for whom a compensation for board or lodging is received or expected shall be considered a member of the family within the intent and meaning of this act.

Tenth. All pensions from the United States or from any of the states of the Union, until paid into the hands of the pensioners.

Eleventh. The polls of all active members in good standing of any regularly organized fire company, not exceeding thirty in number in cities or towns, of more than five hundred inhabitants, and not exceeding fifteen in number in towns or cities of less than five hundred inhabitants: *Provided*, That such fire company actually and in good faith possesses apparatus for the extinguishment of fires, exceeding two hundred and fifty dollars in value, to be determined by the assessor of the proper county.

(5579) § 3. All other property, real or personal, shall be subject to taxation in the manner provided in this act:

First. Lands and lots in towns and villages and cities, including lands bought from or donated by the United States and from the Territory and whether bought on credit or otherwise.

Second. Ferry franchises and toll bridges, which for the purpose of this act are to be considered as real property.

Third. Lands or lots shall be assessed to the owner thereof at their actual cash value on the first day of January of each year, and the owner on that day shall be liable for the tax of that year.

Fourth. Horses and neat cattle, mules and asses, sheep, swine and goats.

Fifth. Stocks or shares in any national or other bank or company incorporated by this territory or any other state or territory of the United States and situated in and transacting business in this Territory.

Sixth. All household furniture; including gold and silver plate, musical instruments, watches and jewelry.

Seventh. All private libraries.

Eighth. All pleasure carriages, stages, hacks, omnibuses and other vehicles for transporting passengers.

Ninth. All wagons, carts, drays, sleighs, and every

other description of vehicle or carriages, and all plows, harrows, reaping and mowing machines, harvesters, steam engines, horse powers, grain threshers, and separators, and all other implements and machinery appurtenant to agricultural labor.

Tenth. Annuities, but not including pensions from the United States or any state of the Union until it is paid into the hands of the pensioner.

Eleventh. All manufactures, including building-machinery, and materials.

Twelfth. All money, goods, or property and capital employed in merchandising.

Thirteenth. All property, real and personal, within this Territory, in possession of, or under control of, or held for sale by any warehouseman, agent, factor or representative in any capacity of any manufacturer, dealer or other agent of any such manufacturer of, or dealer in agricultural implements or machinery or other goods, wares, or merchandise.

Fourteenth. Personal property of every description belonging to persons, or companies doing freighting or transportation business and belonging wholly or in part to persons within this Territory, for such part as is owned by said person.

Fifteenth. All other property, real or personal, of any kind not including improvements upon government lands, or lots not deeded.

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#### ARTICLE 2.—MANNER OF LISTING PROPERTY.

(5580) § 1. On or before the first day of January of each year, the Territorial Auditor, Treasurer, and Attorney General shall provide for the use of the Assessor, suitable notices and blank forms for the listing and assessments of all property, and such instructions shall be needful to secure full and uniform assessments and re-

turns, and forward the same to the county clerks, and such county clerks shall furnish the assessors with the same together with such a list of all the entered land, in his county or district, subject to taxation. The list of taxable property assessed to each person shall contain:

First. His lands by township, range, and section and any division or part of a section or numbered fractional lot of any section lying in the county in which the list is required. And when such parcel of land is not a congressional division or sub-division it shall be listed and described in some other mode sufficient to identify it.

Second. His town lots naming the town in which they are situated and their proper description by number and block, or otherwise, according to the system of numbering in the town.

Third. His right and title in any ferry franchise, toll bridge or part thereof, by the total and actual cash value of the same.

Fourth. Amount of capital employed in merchandising or manufacturing, including all buildings, machinery and appurtenances thereto.

Fifth. Number of horses.

Sixth. Number of mules and asses.

Seventh. Number of cattle over six months old.

Eighth. Number of sheep and goats over three months old.

Ninth. Number of swine over three months old.

Tenth. Number of carriages and vehicles of every description.

Eleventh. Amount of taxable household furniture and musical instruments.

Twelfth. Amount of stock or shares in any incorporated company, or company not incorporated.

Thirteenth. Amount of property, machinery or merchandise held and controlled as agent or sub-agent of any person, company or corporation.

Fourteenth. All real property sold by any party or corporation under any form or grant or conveyance or contract therefor of which the vendor had or has an inchoate contingent or equitable title, right or claim, and which is in the name, possession or use of any vendee who has voluntarily taken such grant or contracts for such title, right or claim: *Provided*, That nothing herein shall be construed so as to effect or impair any right of a person holding or claiming lands from the United States under the homestead laws.

Fifteenth. All other property not specially enumerated in this section by its actual cash value, except such as is specially exempted by section two of this chapter.

(5581) § 2. The above list of items may be extended at the discretion of the Territorial Auditor, Treasurer and Attorney General or board of county commissioners, so as to obtain such facts as they may deem desirable.

(5582) § 3. The assessor shall in no case commence assessing before the first Monday of February of each year.

(5583) § 4. All taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof on the first day of February of each year, as soon as practicable on or after the first Monday in February, including all property owned on the first day of February of that year, and in case of stocks of goods, wares and merchandise, and the personal property of banks and banking institutions, including money loans, discounts and credits, the statement shall include the average amount of the same for the preceding year ending on February first. And in order to make the assessment, such assessor shall demand from each person and each person and firm and from the president, cashier, treasurer or managing agent of each corporation, association or company within his county, a statement under oath or affirmation of all the real estate within the county,

and personal property owned by, claimed, or in the use, possession or control of such person, firm, corporation, association or company, whether held by the party sworn, for himself or as agent for another, and shall set out in such sworn statement an itemized account of all classes of property, by this act defined as subject to assessment, by him so held or controlled. If any person, firm, officer or agent shall neglect or refuse, on demand of the assessor, to give under oath or affirmation the statement required by this section, the assessor shall ascertain and estimate from the best information he can obtain, the number, amount and cash value of all the several species of property required, and shall list the same accordingly, and the value so fixed by the assessor, shall not be reduced by the county board of equalization.

(5584) § 5. If the owner of any property not listed by another person shall be absent or unknown to the assessor, he shall ascertain and estimate the value thereof, and if the name of such owner be known to the assessor the property will be assessed in his, her or their name; if unknown to the assessor, the property shall be assessed to "unknown owners." The list shall be signed and sworn to by person making it, and the oath thereto may be administered by the assessor or his deputy, or by any other officer authorized to administer oaths, and shall be certified by him, and the oath may be printed upon the blank form and shall be in substance as follows:

I, A B, do solemnly swear (or affirm), that I have listed above and within, all the lands, town and city lots, personal property, money and credits subject by law to taxation and owned, used, possessed or controlled by me, or by law required to be listed by me for any other person or persons as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, factor, bailee or agent, according to the best of my knowledge.

(5585) § 6. In case any person required to render the list under oath fail or refuse to do so, the assessor in order to perform his duty as required in section 1 shall list the property of said person and as a penalty shall add fifty per cent. to the actual value thereof, and he may examine on oath any person whom he supposes to have knowledge in relation to the property required to be listed; and if any such person refuse to testify when so required, he shall forfeit the sum of five dollars, to be recovered in civil action in the name and to the use of the proper county; and the assessor shall make a minute of the names of persons refusing to swear to such list or to testify in relation to property, and shall note the same on the list and return the same to the board of county commissioners.

(5586) § 7. The said statements of persons refusing to swear shall be endorsed with the name of the person whose property is therein listed, and the assessors shall file them in alphabetical order, and return them to the office of the county clerk by the first Monday of May next ensuing, at which time or before he shall also prepare and deliver his assessment roll correctly copied and each page of said roll correctly footed, showing the total number and value of each class of property, and shall carry the total footings of each page to the abstract in in the back of the book and correctly foot the same so it will show the total number and value of each class of property in his township. And no county clerk shall receive said assessment roll until the same is correctly balanced and footed. All property is to be valued to the assessor, by the person whose duty it is to list the same, but the assessor may place a different value on the same if he is satisfied that the value so given is not correct; but in case he raise said assessment, he shall give to the person listing the same a copy of the schedule showing such increase; and the assessor shall seek to have

assessed the same classes of property at a uniform value throughout the county.

(5587) § 8. The assessor shall take and subscribe an oath to be certified by the officer administering it, and attach it to the assessment roll, which oath is to be in substance as follows:

I, A. B., county or township assessor, in and for . . . .  
 . . . . . county, Oklahoma Territory, do solemnly swear or affirm, that the value of all property, moneys and credits, of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value of the property of any person or body corporate, I have diligently and to the best means in my power endeavored to ascertain the true amount of value; and that, as I verily believe, the full value thereof is set forth in the above returns, And that in no case have I knowingly omitted to demand of any person of whom I was required to make it, a statement of the amount and value of his property which he was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

(5588) § 9. If any person shall wilfully make or give under oath or affirmation a false list of his, her, or their taxable property, or a false list of the taxable property in the use or possession or under the control of him, her or them, and required by law to be listed by him, her or them, or place a false value thereon, such person shall be deemed guilty of perjury and upon conviction thereof, shall be punished therefor as is by law provided for the punishment of perjury.

(5589) § 10. Every inhabitant of this Territory, of full age and sound mind, unless excepted by the provisions of this act, shall list all property subject to taxa-

tion in this Territory of which he is owner or has the control or management in the manner herein directed, but the property of a ward is to be listed by his guardian; of a minor having no other guardian, by his father if living, if not, then by his mother if living, if not, then by the person having the property in charge; of a married woman, by her husband, but if he be unable or refuse, then by herself; of a beneficiary for whom property is held in trust, by the trustee; and the personal property of a decedent, by the executor, administrator or heirs; of a body corporate, company, society or partnership, by the principal accounting officer, agent or partner; property under mortgage, or leased to be listed by and taxed to the mortgagor or lessor, unless by special contract to be listed by the mortgagee or lessee.

(5590) § 11. Commission merchants and all persons trading or dealing on commission, and consignees authorized to sell, when the owner of the goods does not reside in this Territory, are for the purpose of taxation required to list all the property in their possession.

(5591) § 12. All personal property is to be listed, assessed and taxed in the county where said property may be situated and kept, on the first day of February, and if the owner, his agent or person having in charge such property neglect to list it, he will be subject to the penalty hereinafter provided.

(5592) § 13. When any personal property is situated and kept in any unorganized county of this Territory then such property shall be subject to taxation in the organized county to which it is attached for judicial purposes, and shall be listed and assessed by the assessor of said organized county, and the taxes collected therein.

ARTICLE 6—COUNTY AND TOWNSHIP BOARDS OF EQUALIZATION.

(5620) § 1. The township assessor, or township clerk, and township treasurer shall compose the board of equalization for each township; the town or city assessor, mayor or president of the board of trustees, and city clerk, shall compose the board of equalization for cities, towns and villages, and said boards shall meet on the third Monday in April of each year to hear all complaints of persons who feel aggrieved by their assessments.

(5621) § 2. The board of county commissioners of each county shall constitute a board, or a majority of the members thereof, shall hold a session of not less than two days at the county seat, commencing on the first Monday of June in each year, for the purpose of equalizing the assessment roll in their county between the different townships.

(5622) § 3. The county clerk of the county shall be clerk of said board of equalization for the county.

ARTICLE II—ASSESSORS.

AN ACT Relating to Assessors.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

(6068) § 8. The several township and city assessors shall meet at the county seat of their respective counties on the second Monday of January in each year and agree upon an equal cash basis of valuation of such property as they may be called upon to assess. It shall be the duty of the county clerk of each county to notify said township and city assessors at least ten days previous to the date of such meeting.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1897.

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A. M. THOMAS *et al.*, as the Board of County  
Commissioners, etc., Appellants,  
  
*vs.*  
  
D. P. GAY and A. S. REED, Partners as  
Gay & Reed, *et al.*

} No. 287.

AND

D. P. GAY and A. S. REED, Partners as  
Gay & Reed *et al.*, Appellants,  
  
*vs.*  
  
A. M. THOMAS *et al.*, as the Board of County  
Commissioners, etc.

} No. 439.

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APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF  
OKLAHOMA.

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**Brief in support of the contentions of Messrs. Gay &  
Reed et al., denying the power of the Legislature  
of Oklahoma to enact a law providing for the tax-  
ation of cattle upon Indian Reservations, filed by  
leave of the Court and with the consent of Coun-  
sel for Messrs. Gay & Reed.**

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Having obtained the consent of counsel for Messrs.  
Gay & Reed *et al.*, the following brief is, by leave of the

Court, filed for consideration in the above-entitled cases, such permission having been requested because of the fact that many of the questions involved therein have also arisen in certain suits now pending in the courts of Montana to restrain the collection of taxes upon cattle located for grazing purposes upon the reservation of the Crow Indians in that State, under leases similar to those under which the cattle sought to be taxed by the authorities of Oklahoma are grazing upon the Osage and Kansas Reservations in the case at bar, the decision of which latter case would necessarily, in a large measure, determine some if not all of the questions at issue in the Montana cases.

### **Statement.**

The Kaw or Kansas Indian Reservation and the part of the Osage Reservation here involved are within the territorial limits of the Territory of Oklahoma. By an order of the Supreme Court of said Territory, issued in February, 1894, the said Kaw or Kansas Indian Reservation and all of the Osage Reservation north of the township line dividing townships 25 and 26 north were attached to the county of Kay for judicial purposes, which appears to have been done under the authority of section 9 of the organic act of the Territory.

These reservations are entirely without the boundaries of said county of Kay and are not within the boundaries of any organized county, but are within the geographical limits of said Territory, as created and defined by said organic act. They are composed wholly of wild

and unallotted lands, owned and occupied by said Indian tribes and used for grazing purposes, under leases (authorized by act of Congress, as in the Montana case) to Messrs. Gay, Reed, and others by the Osage and Kaw or Kansas tribal governments, approved and ratified by the Commissioner of Indian Affairs and the Secretary of the Interior. None of these lessees are residents of the Territory of Oklahoma.

The act of the Legislative Assembly of said Territory, which is alleged to be invalid, is one that was approved on the 5th of March, 1895, and provides, in substance, that when any cattle are kept and grazed, or any other personal property is situated in any unorganized country, district or reservation of said Territory, such property shall be subject to taxation in the organized county to which such unorganized country, district or reservation is attached for judicial purposes, etc.

In pursuance of said act and in accordance with its further provisions, the county commissioners of said county of Kay, appointed a special assessor to assess all personal property and cattle kept and grazed in the unorganized country and parts of Indian reservations so attached to Kay county for judicial purposes, which assessment was made, and said taxes were levied for territorial purposes by the Territorial Board of Equalization, and for county purposes by the Board of County Commissioners. Before the taxes became delinquent, the cattle owners attempted to remove their respective properties from said reservations, whereupon tax warrants were issued by the treasurer of said county and delivered for

execution to the sheriff, who duly seized a part of said property by virtue thereof.

Afterwards the plaintiffs in error filed separate petitions in the district court of Kay county, praying for injunctions to restrain defendants in error from making any further attempt to collect said taxes, which injunctions were temporarily granted. These petitions were demurred to, and, all the causes being subsequently consolidated, at the hearing of said case the district court sustained the demurrer in part and overruled it in part, holding that all of the taxes levied by the Board of Equalization for territorial purposes and the county levy for court expenses were valid, and as to those levies the injunctions were dissolved, but as to all the other taxes levied by the Board of County Commissioners for county purposes the injunctions were made perpetual. Both parties appealed, and the Supreme Court of the Territory affirmed the decree of the said district court, from which latter decision both parties again appealed to this court.

## **Brief.**

### **I.**

#### **The jurisdiction of the United States over the Osage and Kansas Indians and the lands contained in their respective Reservations.**

At the outset of this brief, we think it important to call attention to the various treaties, statutes and agreements relating to the Osage and Kansas Indians, and

the conditions existing with reference to the reservations in question in this case, both prior and subsequent to the creation of the Territory of Oklahoma, for the purpose of showing that the United States had at the time of the creation of said Territory, and still has, exclusive jurisdiction over said Indians and their lands, and of all matters in any way affecting them, or in which they are interested, and that, therefore, the Legislative Assembly of Oklahoma was without power to enact the law of the 5th of March, 1895, providing for the taxing of cattle grazing upon said reservations under the leases aforesaid.

By a succession of treaties, too numerous here to mention, the Osage and Kansas Indians, who were the aboriginal owners and possessors of vast tracts of land west of the Mississippi River, gradually relinquished portions of the same to the United States until they eventually became located upon and confined within the limits of certain defined reservations in the State of Kansas, large parts of which, as the tribes became reduced in numbers, and as the State became more thickly settled by the whites, were likewise ceded to the United States to be opened up for settlement and resold. The Osages, as will be shown by what follows, were ultimately removed from the State altogether to a tract of country in the northern part of the Indian Territory, which they had originally owned, and which was purchased for their use from the Cherokees, shortly after which the Kansas Indians were also removed from their said reservation and located upon a portion of said land, which they in

turn purchased from the Osages. The details of these latter transactions will appear from the following:

*The Osages.*

On the 26th of June, 1866, a treaty with the Osages, who were then upon their said reservation in Kansas, was ratified by the Senate (*14 Stats., 687*). In articles 1 and 2 of said treaty a large part of their said Kansas lands was sold outright to the Government for a certain sum of money, and a part ceded in trust to be surveyed and sold for their benefit, the proceeds to be placed in the Treasury to their credit. Article 16 of said treaty provides that—

“If said Indians should agree to remove from the State of Kansas and settle on lands to be provided for them by the United States in the Indian Territory, on such terms as may be agreed upon between the United States and the Indian tribes now residing in said Territory, or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent. of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory.”

Subsequently, in pursuance of said treaty, Congress, in section 12 of an act approved July 15, 1870 (*16 Stats., 335*), provided, in substance, that whenever said Indians (the Osages) should agree thereto, in such manner as the President should prescribe, said Indians should be removed from their said diminished reservation in the

State of Kansas to the lands to be provided for them in the Indian Territory, "to consist of a tract of land in compact form, equal in quantity to 160 acres for each member of said tribe, to be paid for out of the proceeds of the sales of their lands in the State of Kansas." On the 10th of September, 1870, such an agreement was entered into by said Indians with the United States for the purpose of obtaining the signatures of the Indians to which, as appears by the report of the Commissioners of the United States attached thereto, they were promised self-government in their new reservation and exemption from intrusion by the whites.

The land of which this new reservation was composed was obtained from the Cherokees under the treaty with that Nation of July 19, 1866 (*14 Stats., 799, 804*), in which it was stipulated that the United States might "settle friendly Indians in any part of the Cherokee country west of the 96th degree, to be taken in a compact form in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked *and the land conveyed in fee simple to each of said tribes, \* \* \** said lands to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President," etc.; and, in pursuance of said act of 1870 and said agreement, the Osages were established upon their present reservation, and the Cherokees were paid therefor the sum of \$1,650,600. By an act approved June 5, 1872 (*17 Stats., 230*), Congress confirmed this reservation in said Chero-

kee country, defining its limits, and concluding with the following provision :

*"And provided further, That the said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land of the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding 160 acres for each member of said tribe, to be paid for by said tribe of Indians out of the proceeds of the sale of their said lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians."*

Thereafter, in the deficiency appropriation act of March 3, 1873 (*17 Stats., 530*), Congress authorized and directed the Secretary of the Interior to transfer from the proceeds of the sale of the Osage lands in Kansas the said sum of \$1,650,600 to pay for the lands so purchased by the Osages from the Cherokees, and in 1883, sufficient money having been realized from such sales to pay for said land, a deed was duly executed by the Cherokees conveying all their rights and title in and to the same to the United States for the use of the said Osage and Kansas Indians, which deed is recorded in Vol. 6 of the Indian Deeds in the office of the Commissioner of Indian Affairs in the Department of the Interior, and see, also, Report of the Commissioner of Indian Affairs for 1883, page 203.

*The Kaw or Kansas Indians.*

As in the case of the Osages, the Kaw or Kansas Indians (and to avoid confusion we will hereinafter refer to these Indians as the "Kansas" Indians only, the name "Kaw" being merely a corruption of the word "Kansas")

had been residing upon their diminished reservation in the State of Kansas, the limits of which were established by the treaty of 1860 (*12 Stats., 1111*), the remainder of their original country having been stipulated in said treaty to be sold, the proceeds thereof to be expended for the benefit of said Indians and in the payment of their debts.

Thereafter Congress passed an act, approved May 8, 1872 (*17 Stats., 85*), providing, among other things, that the unsold lands of said Indians in Kansas be sold, the proceeds to be applied to the payment of their liquidated indebtedness, and the excess, if any, to be distributed to the Indians *per capita* in money. Then follows a provision similar to that in the case of the Osages, in these words:

"If the Kansas tribe of Indians shall signify to the President of the United States their desire to sell their diminished reserve, as indicated in said treaty, including lands held in severalty and in common, and to remove from the State of Kansas, and shall so agree in such manner as the President may prescribe, the Secretary of the Interior may cause the same to be appraised \* \* \* and sold \* \* \* and the proceeds of said sales shall belong to said tribe in common, fifty per centum of which shall be placed to their credit on the books of the Treasury \* \* \* and the remaining fifty per centum of the proceeds of sales as aforesaid, shall be used in providing and improving for them new homes in the Indian Territory, and in subsisting them until they may become self-sustaining."

Then, upon their agreeing so to remove, the provision above quoted was made by Congress in the act of the

5th of June, 1872 (17 *Stats.*, 230), for the location of said Kansas Indians on the lands of the Osages in the Indian Territory, which had been purchased from the Cherokees, and which lands of the Kansas Indians were to be paid for out of the proceeds of the sale of their lands in Kansas. Pursuant to said acts of Congress and said agreement, a tract of land containing 100,157.32 acres was purchased and set apart for the use of these Kansas Indians in the northwestern part of said Osage Reservation, for which they paid to the Osages, out of the sale of their diminished Reservation in Kansas, the sum of \$70,096.12.

*The Cherokee Title.*

The title of the Cherokee Nation to the tract of country of which the present Osage and Kansas Reservations form a part was considered by this Court in the case of *Holden v. Joy* (17 Wall., 211), and it was there held, among other things, that "Indian tribes are capable of taking as owners in fee-simple lands by purchase where the United States in form, and for a valuable and adequate consideration, so sell to them," and that the Cherokee lands were conveyed to them in fee. Justice Clifford, in the opinion, recites the historical facts which led to the acquiring of these lands by the Cherokees, as follows:

"Disturbances, and in some instances collisions, of a threatening character occurred between the Cherokee Nation of Indians and certain citizens of the States or Territories in which they resided, in consequence of which the United States and the

Cherokee Nation became anxious to make some arrangement whereby the difficulties which had arisen by the residence of the Indians within the settled parts of the United States or territorial governments might be terminated and adjusted. Measures of various kinds had been devised and tried without effectually accomplishing the object, as will be seen by reference to some of the early treaties with that nation and the acts of Congress upon the subject.

"Treaties of the kind were concluded with that nation of Indians on the 6th of May, 1828, and on the 14th of February, 1833, in both of which the United States agreed to possess the Cherokees of seven million acres of land west of the Mississippi river, bounded as therein described, and to guarantee it to them forever, upon the terms and conditions therein stipulated and agreed. Enough appears in those treaties to show that it was the policy of the United States to induce the Indians of that nation resident in any of the States or organized Territories of the United States to surrender their lands and possessions to the United States and emigrate and settle in the territory provided for them in those treaties. Sufficient is known, as matter of history, to justify the remark that those measures, as well as some of like kind of an earlier date, were unsuccessful, and that the difficulties continued and became more and more embarrassing. *Cherokee Nation v. Georgia*, 5 Pet., 15; *Worcester v. Georgia*, 6 *id.*, 515.

"Prior measures having failed to accomplish the object of quieting the disturbances or removing the difficulties, the United States, on the 20th of December, 1835, concluded a new treaty with the Cherokee Nation, with a view to reunite their people into one body and to secure to them a permanent home for themselves and their posterity in the country selected for that purpose, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their

choice and perpetuate such state of society as might be consonant with their views, habits, and condition. \* \* \*

"Even treaties proved ineffectual, as one after another failed to accomplish the desired end. They would not emigrate without compensation for their improvements, and many were reluctant to accept any of the terms proposed upon the ground that the quantity of land set apart for the accommodation of the whole nation was not sufficient for the purpose. Twice the United States offered the seven million acres of land, with other inducements, but the terms, though formally accepted, did not have the effect to accomplish the end. Experience showed that better terms were required, and the Government agreed to purchase their lands for the consideration named in the treaty and to convey to the Indians in fee-simple title the additional tract of 800,000 acres."

After further remarking that the lands east of the Mississippi that were conveyed to the United States by the treaty of 1835 had been held by the Cherokees under their aboriginal title, acquired by immemorial possession, and that, therefore, they were competent to make the sale to the United States and to purchase the lands agreed to be conveyed to them ; and, further, that as the United States had, by the treaty of 1825, acquired the lands so conveyed to the Cherokees west of the Mississippi from the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee Nation, the Court says that on the 1st of December, 1838, a patent for the land promised was (and which included the lands conveyed by the treaties of 1828 and 1833) issued by the President in full execution of the second and third articles of the treaty.

In the treaty with the Cherokees of the 6th of May, 1828 (*7 Stats., 311*), referred to by the Court in the above quotation, the intention of the Government and of the Indians that said Nation was to hold said lands absolutely, and that they were never to be embraced within the limits or jurisdiction of a State or Territory, was fully expressed. It is there asserted that it is—

“The anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers in the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of the limits of any existing Territory or State.”

In Article 3 of said treaty of December 29, 1835 (*7 Stats., 478*), with the Cherokees, it is provided that the lands ceded to said Indians by the treaties of 1828 and 1833, including the lands ceded by the said treaty of 1835, shall be conveyed to the Indians in one patent; and in Article 5 it is provided that these lands shall not, at any future time, be “included within the territorial limits or jurisdiction of any State or Territory” without the consent of the Indians.

**The title to the lands in question purchased by the Osage and Kansas Indians is the same as that theretofore held by the Cherokees, and all rights of exclusive jurisdiction thereover and exemption from the interference or control of any Territory or State passed to the Osage and Kansas Indians by virtue of said purchase.**

This is the title that was conveyed to the Osage and Kansas Indians (or to the United States for their use, by the deed above referred to under the authority of the various acts and treaties set forth herein. In none of the subsequent treaties or statutes that we have been able to find have either the Cherokees or the Osage and Kansas Indians consented that the lands here in question should be included within the limits or jurisdiction of the Territory of Oklahoma; and, as it is an historical fact that the Osage and Kansas Indians were removed from the State of Kansas for practically the same reasons that induced the removal of the Cherokees from the States east of the Mississippi, it must be presumed that it was the intention of all the parties at the time of their removal that these Osage and Kansas Indians were to have the same rights in the land purchased by them that were possessed by the Cherokees at the time of such purchase.

It is obvious that as said treaties provide that *the lands therein designated* (not any other lands that might be at any time owned by the Cherokees) should never be embraced within the limits of a Territory or State without the consent of said Indians, the exemption thereby

created, or the right of the Indian owners to avail themselves of such exemption *is a right that runs with the land* subject to which said lands, or any part thereof, could be conveyed to other Indians, and is not a right pertaining alone to the Cherokees, which ceased to exist when the ownership of the Cherokees therein terminated. Therefore, said right, if not relinquished by the Cherokees prior to the execution of said deed passed to the United States for the use of the Osage and Kansas Indians, upon their purchase of said lands, and can not be extinguished by the United States until the consent of said Indians is obtained.

Congress, however, in the act creating the Territory of Oklahoma, has included these Osage and Kansas lands within the geographical limits of said Territory ; but, as will appear from what follows, was careful to reserve to the United States exclusive jurisdiction over said lands and their occupants, and to provide against the impairment of any of the personal or property rights of the Indians included in said Territory, as secured to them by their treaties and agreements and the statutes of the United States.

#### *The Organic Act.*

Having thus seen what were the rights and title of the Indians in and to the lands here in question, and the jurisdiction of the United States over themselves and their lands prior to the passage of the act creating the Territory of Oklahoma, we now turn to said act for the purpose of seeing whether, by the provision thereof, any

of this jurisdiction or authority of the United State or these rights of the Indians were thereby relinquished or conferred upon the Legislature of said Territory. In the first section of said act, which was passed on the 2d of May, 1890 (*26 Stats.*, 81), it is provided that—

“Nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.”

One of these rights, conferred upon the Indians by Congress in the exercise of this retained jurisdiction and authority over said Indians and their lands, is the right to lease the unoccupied portions of their reservations to cattle owners for grazing purposes, it being provided in section 3 of the act of February 28, 1891 (*26 Stats.*, 794), that—

“Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.”

**The provisions of the foregoing treaties, agreements, and acts of Congress should receive a liberal construction, and all doubts arising thereunder should be resolved in favor of the Indians.**

This Court, as will be seen by the cases to which we shall hereinafter refer, has uniformly in its decisions recognized the principle that where there is a clause in a treaty with an Indian tribe or nation, providing that their lands shall never be included within the limits or jurisdiction of any State or Territory without their consent, the jurisdiction of the United States over all persons and property, whether belonging to Indians or not, within the Indian reservation is *absolute*, and consequently no State or Territory, or any county thereof, contiguous to such reservation, or within the geographical limits of which such reservation is situated, could tax the property of persons other than Indians located upon said reservation for any purpose whatsoever, whether the Indians were in any way interested in said property or not.

This being so, we respectfully submit that if this court has any doubt about the fact that these Osage and Kansas reservations are excepted from the jurisdiction of the Territory of Oklahoma by the treaties and statutes above set forth, and by the provision of the organic act of the Territory which we have above quoted, that doubt should be resolved in favor of the Indians. We will hereinafter, we think, conclusively demonstrate that the

Indians themselves are deeply and pecuniarily interested in the property upon which these taxes are sought to be collected, and that said taxation is not a matter in which they are in no way concerned, as contended by counsel for the taxing authorities, but it is sufficient for the purposes of this branch of the discussion to say that should the decision of the Court below be allowed to stand, these Indians would be deprived of substantial rights and benefits derived from the leasing of their land which are secured to them by said treaties and agreements, and by the provisions of said organic act.

In the case of the *United States v. Kagama* (118 U. S., 375), this Court, on pages 383 and 384, defines the attitude of the United States towards the Indian tribes as follows :

“ These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food, dependent for their political rights. *They owe no allegiance to the States, and receive from them no protection.* Because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen.”

After citing and stating the substance of the decisions in the cases of *Worcester v. Georgia* (6 Pet., 515); *Fellows v. Blackman* (19 How., 366), the *Kansas Indians* (5 Wall.,

797), and the *New York Indians* (5 Wall., 761), the Court proceeds :

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The principle for which we are now contending, namely, that the language used in treaties with the Indians should never be construed against them and so as to subvert rights supposed and intended to exist thereunder, is stated in the case of the *Choctaw Nation v. The United States* (119 U. S., 27-8), where the court quotes with approval what we have above quoted from the case of *Kagama*, and also quotes the following from *Worcester v. Georgia* (6 Pet., 515, 582) :

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction.*"

If this be so with relation to treaties, upon precisely the same principle should all agreements and dealings

of every description with this unlettered and helpless people by which they are led to part with their lands, and all statutes enacted as a result of such agreements and dealings, be construed in favor of the rights of person and property supposed by the Indians to exist at the time of such transactions, and not to be surrendered as a consequence thereof.

In this case there can be no doubt, and it is a part of the history of this country, that it was the general policy of the United States, and was so understood by the various tribes of Indians that were removed from the States at the time of the removal of the Indians in question that they should be located upon tracts of country entirely without the limits or jurisdiction of any State or Territory so long as they should maintain their tribal relations and hold their lands in common. It was understood that they should be removed to a section of country in the Indian Territory where they would be wholly under the control and jurisdiction of the United States, and where they would be perfectly free from intrusion of, and possibility of conflict with, the whites.

In conformity with this policy, said Indians were located upon lands in the Indian Territory that were paid for with their own money, derived from the sale of their lands in Kansas, located upon lands in relation to which it had been expressly stipulated in the treaties referred to that they were not, without the consent of their owners, to be included within the limits or jurisdiction of any State or Territory. No such consent was ever given, either by the former owners (the Cherokees)

in the deed of conveyance above referred to, or otherwise, or by the present equitable owners (the Osage and Kansas Indians) in any subsequent treaty or agreement.

It is, therefore, obvious that in accordance with the attitude toward the Indians of the United States above defined by this Court, this principle should be applied to the transaction in question in the present case, and that these Indians should be allowed to hold their lands and their property, and everything pertaining thereto, under the laws of the United States, and that they should be protected from interference therewith by the Territory of Oklahoma, and all other States and Territories of the United States whatsoever.

Counsel for the taxing authorities, however, assert that in the absence of stipulations in the treaties with the *Kansas* and *Osage Indians*, providing that the lands at present held by them shall never be included within the limits or jurisdiction of a State or Territory, personal property, other than that of Indians, situated upon said reservations, is taxable to the same extent and for the same purposes as personal property of white citizens in any other part of the Territory.

In asserting this proposition, counsel, of course, assume that as no such stipulations appear in the treaties with the *Kansas* and *Osage Indians* themselves, no exemption of the character above described exists with reference to their lands, and that, therefore, when their reservations were included within the geographical limits of Oklahoma by the act of the 2d of May, 1890, creating said Territory, only the rights of person and

property pertaining strictly to the Indians were excluded from the jurisdiction of the Territory.

Aside from the fact (as we will hereinafter show) that the Indians *are* actually interested in the property sought to be taxed, we do not think the cases cited by counsel from this Court sustain their contention. We do, however, admit that there is a conflict in the decisions of the courts upon this question as to whether property of persons, other than Indians, upon Indian reservations can be taxed for Territorial or State purposes, and many cases might be cited on both sides. For example, the decision of the Circuit Court of Appeals in the case of *Truscott v. The Hurlbut Land and Cattle Company* (19 C. C. A., 374) is in favor of such a tax upon cattle grazing upon the reservation of the Crows in Montana, while the decision of the Court in *United States v. Partello* (48 Fed. Rep., 670) is against the jurisdiction of Montana, exercised for *any* purpose, even to punish crimes committed by white persons upon the same reservation. So, also in the case of *Ewing* (47 Fed. Rep., 813). But there has been as yet no decision of this question by this Court.

The two cases from this Court, cited by counsel, to the above propositions are the cases of the *Utah and Northern Ry. Co. v. Fisher* (116 U. S., 28) and *Maricopa and Phoenix Railroad Co. v. Arizona* (156 U. S., 347). In the case of *Utah and Northern Ry. v. Fisher* there was levied under the laws of the Territory of Idaho, for territorial and county purposes, a tax upon said railroad, its depots and other property, within the Fort Hall Indian Reser-

vation. The railroad attempted to enjoin its collection on the ground that the reservation was excluded from the limits of Idaho by the act creating the Territory, which provided, in substance, that nothing therein contained should be construed to impair the existing rights of Indians in Idaho so long as they should remain unextinguished by treaty, or to include within the boundaries or jurisdiction of said Territory any lands which by treaty with the Indian tribes were not without their consent to be included within the limits or jurisdiction of any State or Territory, or to affect the authority of the United States to make any regulations respecting the Indians, their lands, property, or their rights, etc., which it would have been competent for the Government to make if the act had not been passed.

The Court held that at the time of the creation of the Territory there was no treaty with the Indians stipulating that the lands which might be reserved to them should be excluded from the limits or jurisdiction of any State or Territory, and that the clause of the proviso in said act on that head had therefore no application. The Indians having ceded to the United States, for \$6,000, a strip of land and several parcels adjoining it, to be used by the railroad as a road-bed and for stations and other structures, said land was held, *by force of this cession, to be withdrawn from the reservation*, and it was for that reason that the Court held that it became subject to the laws of the Territory relating to railroads. There is therefore manifestly no analogy between this case and the case at bar, as in the case at bar the Indians have

not parted with their ownership of the lands occupied by the cattle sought to be taxed, but the lands are still a part of the reservations in question, and still subject to the jurisdiction of the United States.

The case of the *Maricopa and Phoenix Railroad Co. v. Arizona* (156 U. S. 347), is almost precisely the same as the case of the Utah and Northern Railway, just referred to. The lands granted to the railroad through the Indian reservation there in question were held to have been *withdrawn*, the consequence of which was to re-establish the dominion of the territorial authority thereover, the reservation being within its limits.

There have been many other cases in this Court not cited by counsel, in which the question of the jurisdiction of territorial and State governments over Indian reservations has been considered, most of which relate to the service of process or the right of a State or Territory to punish crimes committed upon such reservations by white men, and none of which relate to the taxation of property (see *Harkness v. Hyde*, 98 U. S., 476; *U. S. v. McBratney*, 104 U. S., 621; *Langford v. Monteith*, 112 U. S., 45; *Ex parte Crow Dog*, 109 U. S., 556; *U. S. v. Kagama*, *supra*; *U. S. v. Pridgeon*, 153 U. S., 48, and *Draper v. The United States*, decided at the last term of this Court, 164 U. S., 244), but none of those cases, so far as we can see, have any application to the case at bar.

In the event, however, that the Court should not agree with us in the view of this case which we have above presented, and should hold that the treaties, agreements, and statutes hereinbefore set forth do not have the effect

of excluding the reservations in question, and all persons and property lawfully therein, from all jurisdiction thereover, of every kind and description, by the Territory of Oklahoma, we desire to call the attention of the Court to several other propositions which, we think, are conclusive of this question, whether, even if persons and property belonging to others than Indians upon these reservations are subject to the jurisdiction of said Territory for some purposes, the act providing for the taxation of said cattle is illegal, and to these propositions we now turn.

## II.

**The taxation of cattle located for grazing purposes upon the reservations in question in this case, under leases duly authorized by act of Congress, is a violation of the rights of the Indians and an invasion of the jurisdiction and control of the United States over them and their lands—this irrespective of the question whether said lands are, by the treaties, etc., above referred to, excluded from the limits and jurisdiction of the Territory of Oklahoma.**

The contention of our adversaries with reference to this branch of the case seems to be that, as the cattle upon these reservations do not belong to the Indians themselves, but to white persons who do not reside upon said reservations and have no connection with the Indians whatever, the Indians are, therefore, in no way interested in said cattle or in the disposal thereof, and the Territory and the county to which said lands are at-

tached for judicial purposes have the right to tax said cattle, because, in doing so, they do not interfere with the jurisdiction of the United States over the Indians themselves and their property and lands, or with the rights of said Indians.

From the authorities to which we have already referred it will be seen that it is extremely doubtful whether the territorial or county authorities would have the right to tax property of others than Indians located upon such reservations, even if it could fairly be said that the Indians were not in any way interested in such property and that their rights of person or property could not in any way be affected by such taxation. Indeed, in the only two cases that we have been able to find in which this question of taxation of such property was considered by this Court, namely, the cases of *Railway Company v. Fisher* (116 U. S., 28) and *Railroad v. Arizona* (156 U. S., 347), to which we have already referred, there seems to be a tacit recognition of our contention, as the Court in each of these cases is careful to say that it was because of the fact that the lands upon which the property of the railroad companies was situated were *actually withdrawn* from the reservations that the State or Territorial authorities had the right to tax it.

But we do not think that this latter question becomes important in this case, as it seems to us, for the following reasons, to be perfectly obvious that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of person and property are seriously affected by said act. Of course, the very object

of leasing these Indian lands is to avoid the payment of taxes upon the cattle located thereon for grazing purposes. The money contracted to be paid for this privilege is paid to the Indians directly, as a tribe, and is used and expended by them for their own purposes, and if, for any reason, the conditions existing at the time the leases were executed were changed, or could be changed by the Legislature of Oklahoma at its pleasure, naturally the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

It is evidently upon the basis of the supposed exemption of this property from such taxation that the prices charged under these leases are fixed and agreed upon, and as it must, of course, be presumed that the prices charged by the Indians and approved by the Department of the Interior are as high as could be obtained from the cattle-owners under the circumstances that exist at the time the leases are made, it necessarily follows that anything that might occur that would increase the cost to such lessees of grazing their cattle upon said lands would, at least to the extent of the excess of such cost over what lands could be leased for in other localities, decrease the rental value of the lands contained in these reservations. If cattle-owners could obtain the use of lands in the Indian Territory, for instance, where their cattle would be free from such taxation, for the same price that they could be obtained for in the reservation in Oklahoma, the question of taxation would, of course, be taken into consideration: and, other things being equal, the lands in the Indian Territory would be leased, and the Osage

and Kansas Indians deprived of the considerable income derived from this source, which appears to be about the only means provided by law by which the Indians can derive an income from the use of their unoccupied and otherwise unused lands.

This being so, the taxation of such cattle (which, as we have seen, are the means or instrumentality by which the Indians derive an income from their unoccupied lands, and of which they would be deprived altogether if such grazing privilege should be made so expensive that the cattle-owners could not afford to lease them), is necessarily a servitude upon the land itself, which, of course, the Territory of Oklahoma has no right to impose.

All the authorities that we have been able to find including those above cited, recognize the fact that the Territory would have no power or authority to tax any portion of the land itself, nor would it have the power to tax the personal property of said Indians—in other words, the income derived from said lands, and if it could not do this, it could not, of course, legally enforce the collection of a tax which, although not so providing in terms, nevertheless accomplishes the same thing. *It is the substance and not the form which controls*, as has been established by repeated decisions of this Court. (157 U. S., 580.)

We therefore submit that the Territory of Oklahoma can not do in this indirect way what it could not do directly; and, in this connection, refer to the case of *Pol-*

*lock v. Farmers' Loan and Trust Company* (157 U. S., 429), known as the "income tax case," the principles enunciated in which are so familiar that it is unnecessary further to comment thereon. We will only say that this case appears to us to be absolutely conclusive of the case at bar; for, if the *lands* and *property* of these Indians are exempt from such taxation, and if "an annual tax upon the annual value or user of real estate" is the same in substance as a tax upon the real estate itself, then, of course, any tax upon the means by which the land is so used is a tax upon the land or income itself.

The act of the Territorial Legislature providing for such taxation is, therefore, in direct conflict with the laws of the United States and the act permitting the Indians to use their unoccupied lands for grazing purposes, as, if a tax is put upon such cattle, the Indians would either be obliged to reduce the amount charged for the privilege or lose their income derived from that purpose altogether.

### III.

**The tax in question is in violation of the provisions of the Constitution of the United States that "Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes."**

The act of the Legislative Assembly of Oklahoma is also in conflict with clause 3 of section 8, article 1, of the

Constitution of the United States, providing that "Congress shall have power to regulate commerce \* \* \* with the Indian tribes," in that it interferes with, or imposes a servitude upon, a lawful commercial intercourse with the Indians, over which Congress, under the terms of said provision of the Constitution, has *absolute* control, and in the exercise of which control it has enacted the statute authorizing the leasing of the unoccupied lands of the Indians to which reference has already been made.

It can not be denied that the lands in question in this case, whether they are held to be entirely and completely excluded from the jurisdiction of the Territory of Oklahoma for all purposes or not, are subject to the undisturbed use and occupation of the Osage and Kansas Indians, as we have above shown, and were set apart by the United States, and reserved from the territorial jurisdiction conferred by the organic act for their exclusive enjoyment and benefit. These lands being so owned by said Indians and paid for with their own money, they are, of course, entitled to the free and unrestricted use of them in their intercourse with outside parties within the scope of such laws and regulations as Congress has made with reference thereto, and one of the modes provided by Congress for securing a benefit and deriving an income from said lands is by means of the leasing thereof for grazing purposes, as aforesaid.

"Traffic" is "commerce" (*Gibbons v. Ogden*, 9 Wheat., 1; *United States v. Holliday*, 3 Wall., 407), and dealing

with the Indians with reference to the utilization of their lands is traffic or commerce, which Congress has the exclusive power to regulate, and in this instance has regulated, as above set forth. It is not necessary, in order to bring this case within the constitutional provision, that the traffic shall begin outside and end or continue inside the reservation, or *vice versa*. It may begin or end in or be wholly confined to that reservation, and yet is commerce over which Congress has such supreme control. (*United States v. Holliday, supra.*)

The grazing of cattle upon these lands being a special means provided by Congress for utilizing them for the benefit of the Indians, is perfectly clear that it is not within the power of a Territory or State to tax that instrumentality. A State can not tax the bonds of the United States for familiar reasons, and it is submitted that upon precisely the same principle these cattle can not be taxed. The cattle are inseparably connected with the use and benefit derived from said lands, and it is, of course, impossible, therefore, to subject them to taxation without impairing this use and benefit.

Therefore, Congress having regulated this traffic or commerce, under the sole and exclusive jurisdiction of said matter, conferred by said provision of the Constitution, no interference with this right, either directly or indirectly, by the Territorial or county authorities, is permissible, and the legislative enactment on the subject above referred to is unconstitutional and void.

## IV.

**The tax assessed and sought to be collected in the present case is invalid, because not pertaining in a special and peculiar manner to the district within which it is levied, and because not concerning the people of that district more particularly than it does others.**

So much has been said in the other briefs in this case of the subject embraced in the above proposition, and the principle of taxation therein stated is so familiar and has been so universally asserted by the Courts, that any extensive presentation of the authorities here would be utterly useless. We will, therefore, only endeavor to show the application of said principle to the present case, but, before doing so, will quote from Judge Cooley the concise and comprehensive statement of said principle contained in the second edition of his work on Taxation (Chap. 5, p. 140), as follows:

"In the preceding chapter we have endeavored to show that in order to give validity to any demand made by the State upon its people under the name of a tax, it is *essential* that the purpose to be accomplished thereby shall be *public* in its nature. But it is *equally essential*, as there intimated, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly, than it does others. The Federal Constitution recognizes this principle in the provisions it makes to prevent the Federal Government from indirectly imposing its support upon one or more of the States to the relief of others." (See article 1, section 8, clause 1; section 9, clauses 4 and 5.)

The purposes for which the taxes were levied in the case at bar are enumerated at page 30 of the record as follows :

For Territorial purposes :

General revenue, 3 mills on the dollar.

University fund, 1 mill on the dollar.

Normal school fund,  $\frac{1}{2}$  mill on the dollar.

Bond interest fund,  $\frac{1}{2}$  mill on the dollar.

Board of education fund,  $\frac{1}{2}$  mill on the dollar.

For county purposes :

For salaries, 5 mills on the dollar.

For contingent expenses, 3 mills on the dollar.

For sinking fund,  $1\frac{1}{2}$  mills on the dollar.

For court expenses,  $2\frac{1}{2}$  mills on the dollar.

For county supplies, 3 mills on the dollar.

For road and bridge fund, 2 mills on the dollar.

For poor fund, 1 mill on the dollar.

For county school fund, 1 mill on the dollar.

In short, these are the usual purposes for which taxes are levied upon the property of persons resident in the existing counties of the various States and Territories, and it is difficult to see how these Indians, who, as we have shown, are directly interested in the property sought to be taxed, or the plaintiffs in this case, who are all non-residents of both the Territory of Oklahoma and the county of Kay, and have no property therein, can derive any benefit from the expenditure of the money accruing therefrom.

As has been already stated, the trial court in this case

held that the county levy of  $2\frac{1}{2}$  mills for court expenses and all the levies for territorial purposes were valid, but that the other county taxes were invalid. Upon appeal by both parties to the Supreme Court of the Territory, the judgment below was affirmed *by a divided court*, one of the justices holding that all the taxes were valid, another, that they were all invalid, the other two concurring with the court below. Thus it will be seen that in the opinion of but one of the justices below were all these taxes valid; that two of the justices concurred with the trial court in holding that the county taxes were invalid because "the people upon these reservations are not interested in such levies, and receive no benefit from the expenditure of the moneys derived therefrom," and that the chief justice was of opinion that they were all invalid. (*R.*, p. 44.)

It seems to us that there can be no doubt whatever about the soundness of this opinion concurred in by four of the five justices of the court below (one of them, who did not sit at the hearing of the appeal, being the justice who decided the case in the first instance), that the county taxes for salaries, contingent expenses, sinking fund, county supplies, roads and bridges, poor fund, and school purposes are invalid. The reservations in question in this case being attached to the county *only* for *judicial* purposes, it is, of course, impossible that either the Indians, who are under the exclusive jurisdiction of the United States, or the owners of the cattle, who are residents of other States, could derive any benefit from such taxes, or that the district in which the

taxed property is located should be more particularly concerned in and benefited by the expenditure of the proceeds of such taxes than any other district.

The only question, therefore, is as to whether the tax for territorial and county court purposes is valid, for it is contended that although these reservations are not a part of the county of Kay, or within its limits, and are only attached thereto for judicial purposes, still as they are within the limits of Oklahoma, as defined by the act creating said Territory, the property of persons other than Indians located therein, must be made to bear the same burdens with respect to territorial and county court expenses as that of persons situate within the regularly organized counties of the Territory.

Of course, if our contentions with regard to the other matters referred to in this brief are to prevail, this whole question of taxation is thereby disposed of, and the territorial as well as the county authorities must be held to have exceeded their power in taxing the cattle of these complainants, but, assuming that the Court should not agree with us in the views above expressed, we still think that it is obvious that neither the occupants and possessors of the equitable title to said lands (the Indians) nor the parties owning the property taxed, can by any possibility derive any more benefit from the expenditure of the money derived from these territorial taxes than they could from such county taxation, they should likewise be declared void by this court.

Looking at it from the point of view of the owners of the cattle, how can it be said that they could by any

possibility be interested in, or benefited by, the maintenance of a normal school, a university fund, a board of education, the payment of interest on the bonded indebtedness of the Territory, or the sufficiency of the general revenue? It is not with the Territory of Oklahoma with which they have to deal, but with the United States and the Indians directly, and with regard to the use of lands over which the Territory has absolutely no jurisdiction. Neither they nor their said property receive any protection under the laws of the Territory, or any of the benefits of citizenship therein, the land upon which said cattle are located being a separate and distinct reservation for the use of the Indians alone, and not subject to any other jurisdiction or supervision than that of the Government of the United States.

So, also, in the case of the Indians, who, as we have seen, are likewise vitally interested in this tax. They are not citizens of the Territory, they are not represented in the Legislature or county board, they have absolutely no voice in the expenditure of the tax, and they receive from the Territory no protection.

In other words, this is an attempt to tax property in a jurisdiction over which the Government of the United States has exclusive control—to tax property located upon lands of which the Indians are guaranteed by the treaties and statutes, above set forth, the sole and exclusive use and benefit. This tax confers, and could confer, no benefit whatever upon these Indians or their lessees, either directly or indirectly, and is of benefit alone to the people outside of said reservation in the county of

Kay so far as the taxes are for county purposes, and in the Territory of Oklahoma, so far as they are for territorial purposes. It is, therefore, clearly taxation without representation, and without resulting benefit either to the parties taxed, the parties upon whose lands the taxed property is situate, or the district in which the tax is levied, and as such can not lawfully be levied and collected.

Upon all the grounds aforesaid I respectfully submit that the act in question in this case, providing for the taxation of these cattle, should be declared unconstitutional and void.

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